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Immigrant Internment:

An Investigation of Record High Immigration Detentions in the Contemporary United States

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General Honors Thesis
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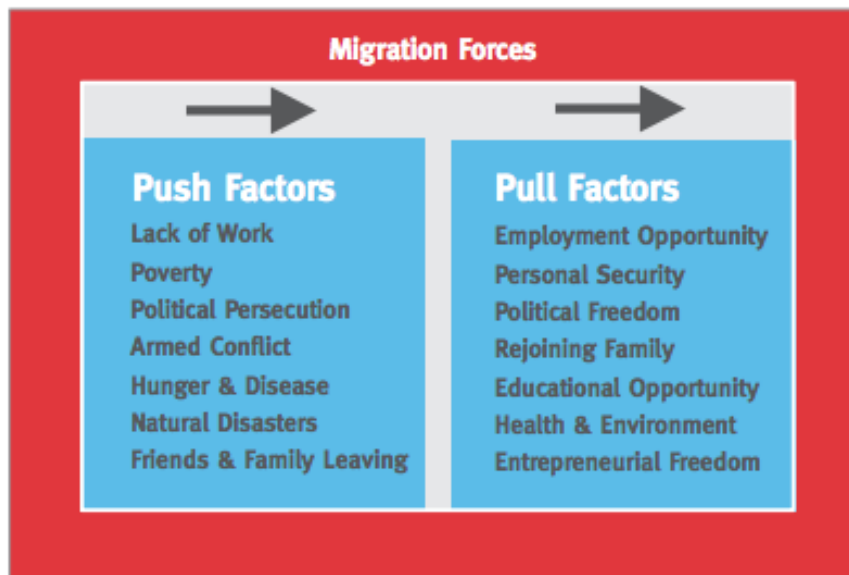
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Abstract

This paper investigates why the United States is currently detaining immigrants at record high levels. It profiles the cultural, business, and political influences that affect immigration detention policy. The history, current laws, and politics that dictate the immigration detention system are examined, with special emphasis on current law enforcement partnerships between Immigration and Customs Enforcement and local law enforcement agencies. This project also deconstructs who qualifies as a “criminal alien” and the due process protections that exist for non-citizens who are detained. Eleven original policy recommendations for immigration detention are included near the conclusion.

Preface

I have always been interested in the experiences of immigrants in the United States. I – and probably all who read this – have been surrounded by first or second generation immigrants for our entire lives. Whether we like it or not, they make up a large portion of our country and shape the world we experience every day. Immigrants are our family members, neighbors, employers, employees, coworkers, and friends. The roughly 40 million foreign-born residents in the United States (Hansen) did not appear out of thin air. They made the difficult decision to uproot from their homeland and transplant themselves to a distant and unfamiliar place. Human migration like this is not easy to explain; every person has their own rationale for why they do it. There are a number of complex factors that can push a person out of their country and pull them to



Source: www.DU.edu (see *Architecture*)

Figure 1 therefore a lot of

Americans have a hard time empathizing with the plights of immigrants in our country. Since I was born in Denver, CO, I cannot fully understand what it is like to relocate my entire life to the U.S. However, I think that traveling outside of the country to experience

the United States, as shown in Figure 1.

It is impossible to fathom immigration to the U.S. without having lived the experience, and

new places and people sheds light on immigration; it can serve to humanize people who are often discussed as statistics. Foreign trips have molded my worldview in this way, most notably when I visited Mexico City as a young high school student. It was in Mexico, Distrito Federal, that I truly mingled with poverty for the first time. I was deeply moved by the countless fellow human beings that I saw in the streets begging for something to eat or even a single peso. I was most struck by how many of them did not have shoes, while it is commonplace to trash mildly worn shoes in the U.S. I still have vivid memories of that trip, and of one man in particular who was begging in the subway without shoes – because he had no legs. For a long time I assumed that the poverty I saw in Mexico was a failure of economics or the social welfare system and therefore an issue that required political or private sector innovation to solve. That may be the case, but it was not until years later that I associated a path to a better livelihood with the opportunity that comes with moving from one place to another: migration.

Powerful films like *El Norte* (Gregory Nava, 1983) and *A Better Life* (Chris Weitz, 2011) helped expose me to the difficulties that face many immigrants upon arrival in the United States and played an integral role in the evolution of my thinking. However, it was not until my junior year of college during my semester abroad in South America that I truly realized how powerfully our country represents opportunity to people who want to improve their lives. In South America I felt like everywhere I turned I encountered studious students - and no, that clause is not redundant. The majority of the students I met there put me and my University of Colorado compatriots to shame. I had a jarring realization that millions of students in South America (and all over the world) had committed their best efforts to succeed academically; meanwhile, after three years of

college I had been saving my best efforts for relaxation. It was poignant to realize how I had been taking my top-notch opportunity for granted, and yet countless students all across the world would sacrifice, quite literally, everything they had in order to attend a university in the United States. During the student protests that took place while I was in Santiago, Chile, my American classmates and I were forbidden (by the Chilean government and by our study abroad program) to be in the same sector of the city as the demonstrations. So while my Chilean peers were facing tear gas and riot police in the name of accessible, quality education, I was home watching my favorite soap opera, *Pobre Rico*, or out with my American friends exploring a new bar. Not only had I understood the hope that comes with immigration to the U.S., but how that hope is usually deeply rooted in education.

During my first semester back at the University of Colorado I enrolled in Dr. Cathy Comstock's class, Literature and Social Violence, and took advantage of an opportunity to practice my Spanish by volunteering at the Boulder Immigrant Legal Center. These two endeavors conjoined when I wrote my term paper on immigration for Dr. Comstock's class. Although it was a valiant effort, the paper seemed insufficient. I had barely scratched the surface of what there was to learn about the field of immigration. That assignment was my first exposure to immigration detention (which is not surprising since immigrant detainees and detention center owners and operators each have valid personal reasons for wanting to avoid publicity). I could not believe that hundreds of thousands of immigrants, just like those I have met in school or while volunteering, are locked up every year. In my experience, these people have been nothing but caring, sweet, funny, and thoughtful, and almost all of them are here to create a better future for

their families. Innumerable parents end up jailed in immigration detention after having come to this country in order to work exhausting, laborious jobs six days a week with the hope of one day giving their children the opportunity to attend college. Exploring the apparently pervasive but well-concealed human rights abuses that take place in privately owned immigration detention facilities seemed like an appropriate and valuable thesis topic. As I researched this project, I discovered that numerous advocacy and civil rights groups have already written in-depth on the human rights violations and have published numerous reports, detainee narrative accounts, and analyses of the abuses. What emerged to me as the more interesting and compelling study was to investigate why and how immigrants end up in detention in the first place.

Part One: Introduction

1.1 Statement of Purpose

Immigration detention holds non-citizens who are awaiting a decision in immigration court, are already under an order of removal and awaiting their physical deportation, or are seeking entry to the United States for asylum. The system was designed to detain documented and undocumented immigrants who are “flight risks,” i.e., presumed to not return to their court date, or to hold those who pose a dangerous risk to society. As standard practice, the Department of Homeland Security places every removable individual into detention until they are deported, temporarily released on bail, or for asylum seekers, allowed to enter the country.

In 1994, the daily population of detained immigrants in the U.S. was 5,000 people (The History). Going into 2014 that daily population has grown to nearly 34,000 (“Immigration Detention”), an almost seven-fold growth. Over the same time span, the foreign born population has only experienced a 1.7-fold growth (“America’s Foreign”). The central question of this paper is: Why has the number of immigrant detentions increased so much that it has reached historically high levels? Additional, ancillary questions include: Are these detentions just? What recourses and protections are in place to ensure that individuals are not unjustly detained?

There is a general lack of statistics on immigration detention, which makes it a difficult subject to study. However, detention and deportation numbers are tightly correlated¹ and the ample deportation statistics help fill holes in the data. Since detention

¹ For different years, sometimes data is only available for immigrant detention and sometimes it is only available for deportations.

is a precursor to deportation and individuals rarely avoid deportation after being detained, their overall numbers move more or less in sync.² Over a similar time span that detention grew by seven times, annual deportations³ from the U.S. increased from 45,000 in to 387,000 in FY2010 (U.S. Department), over an eight-fold growth. As Figure 2 illustrates,

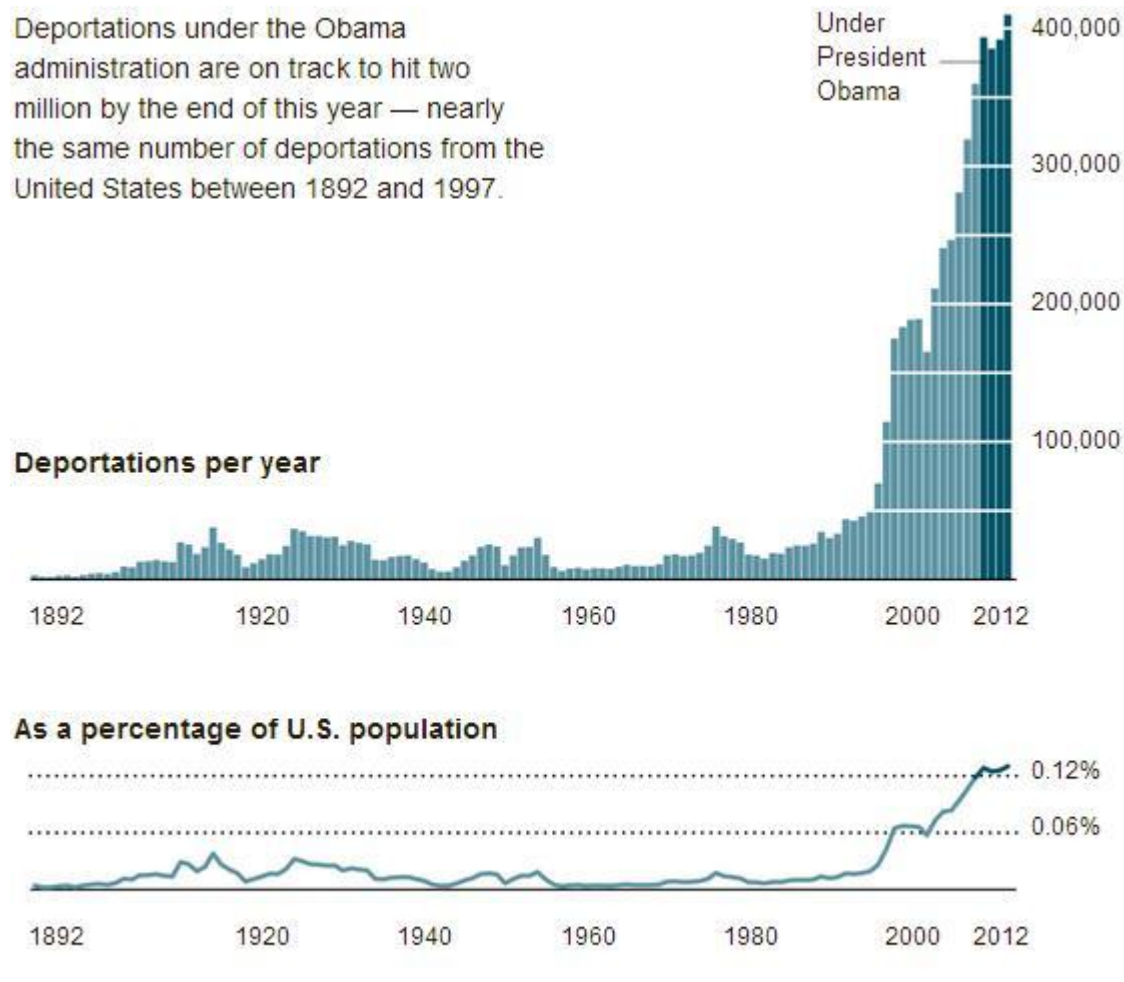


Figure 2

Source: www.NYTimes.com (see Shear)

² For example, in 2011 429,000 immigrants were detained and in the same year 393,000² were deported, a 1.09:1 ratio. Many detainees who were not deported that year were likely asylum seekers who were detained while attempting to enter the country.

³ According to the Department of Homeland Security (DHS), deportations or “removals” are the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry owing to the fact of the removal. “Deportations” is often used interchangeably in the media for “removals,” which are different from “voluntary departures” or “returns.”

the rate of deportations, and detentions, clearly outpaces the rate of population growth.

1.2 Rational vs. Emotional Responses,

Are Immigrants Harmful or Beneficial?

The history behind current U.S. immigration laws and policies is long and complicated, with origins that predate the country itself. Each of the colonial governments in New England had its own sets of laws governing immigration. Then, as now, the populace exhibited broad and varied opinions on immigration policies and who should be allowed to reside within their borders. Some colonies and populations were more hostile than others. One of the Founding Fathers, Benjamin Franklin's vehemently anti-German views were among the most well known anti-immigrant opinions of the colonial era. It is hard to imagine that Germans, who today are a part of the ethnic majority as they fall under the category "White/of European descent" were once seen as a very separate, criminal, and staunchly unwanted people by one of America's historical heroes. Then, as now, not all citizens were anti-immigrant. Some colonies implemented policies to encourage immigration, like Maryland, which offered a tax-exemption on land ownership for a number of years to new residents in the colony (Proper).

Since shortly after the colonies joined to create the United States, one set of federal laws has governed immigration for the entire country. For more than two centuries the citizenry's diverse personal beliefs have been in constant conflict and compromise in the process of deciding who is allowed into the United States. Immigration laws have changed and evolved over time to reflect the beliefs (or prejudices) of Americans during different periods of history. Since its founding, the

United States has pinpointed various ethnic groups and races, sometimes politically and other times only culturally, as undesirable outsiders who pose threats to the fabric of American society. People with heritage from every region of the world have been targeted at one point or another. It appears that any time there has been a wave of immigration from a certain region, there has been a counteracting wave of immigration legislation and enforcement.⁴ Over time, these policies have expanded, repealed, and amended various portions of past and existing immigration laws. However, a mere immigrant presence is not the only factor that provokes movements for a changed immigration system. A myriad of other factors like rising crime, a lagging economy, foreign war, terrorism, and xenophobic fear (often the result of media/propaganda) have inflamed anti-immigrant beliefs in select parts of the U.S. population. Whether the problems facing the United States are exacerbated or improved by immigrants, they are frequently scapegoats when things go wrong, a practice that is consistently rectified years later with the clarity of hindsight. The rationale behind implementing stricter laws and enforcement policies varies based upon each unique iteration of the immigration reform process. In the last few decades, some of the same historical anti-immigrant sentiments have gained traction in the forms of fear of terrorism targeted against people of Middle Eastern descent and concern about employment and economic strain aimed at people with Latino heritage, largely in response to September 11, 2001 and the Great Recession, respectively.

In recent years, immigrants have commonly been blamed for lowering wages and stealing jobs, although there is debate over whether this is true. It is entirely logical that

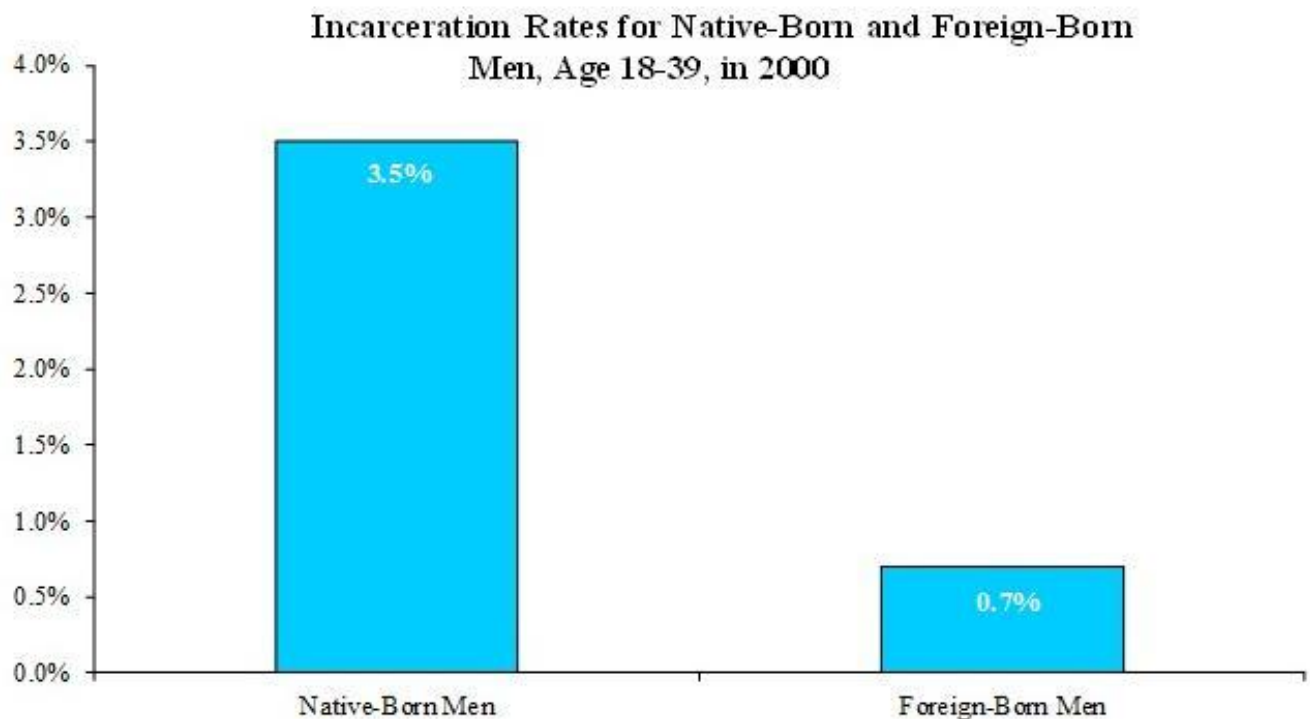
⁴As Dr. Daniel Jones has astutely pointed out, immigration policymaking follows Newton's 3rd Law of Motion, that every action has an equal and opposite reaction.

if there are multiple options to fill a job the cheaper one will win out, and in many cases immigrant workers accept lower pay than citizens to perform a similar job; an out-of-work citizen's frustration is understandable. On a large scale, the Economic Policy Institute explains that, "In the ongoing debate on immigration, there is broad agreement among academic economists that it has a small but positive impact on the wages of native-born workers *overall*: although new immigrant workers add to the labor supply, they also consume goods and services, which creates more jobs" (Shierholz). Moreover, the American Enterprise Institute clarifies that immigrants often have different skill sets than American workers and therefore usually do not directly compete with them for jobs (Zavodny). In fact, the report suggests that the two demographics can be mutually beneficial to one another by supplementing each other in the work force.

In some cases immigrants, especially undocumented immigrants,⁵ are reproached as a drain on social services. Critics frequently blame them for not paying enough in taxes but still using publicly funded services like hospitals and schools. Analysis done at the Bell Policy Center found that in Colorado in 2010, undocumented immigrants cost the government \$166 million and paid \$167 million in taxes (Fairley). Although undocumented immigrants could pay more in taxes if they had legal status, in the current situation immigrants of all legal statuses are an economic net-positive for the United States. Therefore, movements for more deportations or harsher immigration laws based on economic arguments are, in general, unsubstantiated.

⁵ Aside from this sentence, the phrase "illegal immigrant(s)" does not appear in this paper except when quoting an outside source. The preferred and more accurate term is "undocumented immigrant." Labeling people as "illegal" is incorrect (a person can have illegal status, but they cannot themselves *be* illegal), insensitive, and only serves to dehumanize them. Immigrants, regardless of their nationality or legal status, are human beings and should be treated and referred to as such. A person may not have legal immigration status, they might be undocumented, but they are never illegal.

Economic issues are not the only concern that modern U.S. citizens have about immigrants. Many Americans are suspicious of immigrants because they believe that immigrants are dangerous to American civil society because they are prone to incite violence and crime. A survey of theoretical and empirical works on the connection between immigration and crime in 20th-century America found that, “despite claims by pundits and writers that high levels of ‘immigrant crime’ are an unavoidable product of immigration, scholars rarely produce any systematic evidence of this recently reemerging social problem” (Martinez Jr.). As Figure 3 shows, immigrant men age 18-39 are five times less likely to be convicted of a crime and sent to prison than their native-born counter parts.



Source: Rubén G. Rumbaut and Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men* (Washington, DC: Immigration Policy Center, American Immigration Law Foundation, Spring 2007), p. 6.

Figure 3

Source: www.detentionwatchnetwork.org (see *The Influence*)

University of Colorado assistant professor of sociology, Tim Wadsworth, has conducted research that shows that cities with the largest increases of immigration between 1990-2000 “tended to demonstrate sharper decreases in homicide and robbery.” Professor Wadsworth’s research concluded that an average 9.3% drop in homicide rates and a 22.2% drop in robbery rates were the product of immigrant populations (Wadsworth). Together, these data indicate that the native-born population in our country, not the immigrants, produces a higher rate of violent crime. Although many Americans fear immigrant crime, immigrants are less likely to be criminals than native-born people.

In the face of these data about crime and economics relating to immigration, immigrants seem beneficial to the United States overall.⁶ However, as in any population, immigrants include good and bad people. Even though the immigrant population as a whole commits fewer crimes, there are still non-citizens who break the law in the United States. Regardless of evidence, anti-immigrant movements inevitably gather some extreme members who essentially belong to the xenophobic or racist camps and want to remove as many immigrants as possible, while the extremists at the other end of the spectrum believe in amnesty and citizenship for all, without question. With such varying beliefs, in addition to what policies to adopt, a core debate is how strictly to enforce the existing immigration laws.⁷

⁶ Contrary to what many people believe, the immigration predicament facing our contemporary society is not sourced entirely, or even primarily, with undocumented immigrants. The broken immigration system affects non-citizens of every type of legal status and because there is so little reliable research explicitly on undocumented immigrants it is difficult to single them out for detailed study. As such, the research on documented immigrants yields minimum standards for immigration detention and legal protections, which can only be assumed to be the same or worse for immigrants without legal status.

⁷ Interestingly enough, this might be the first time in history that immigrant voices, especially those of Latinos, hold enough political sway to influence the policy making process.

Part Two: Why Record Number of Detentions?

This section enumerates the laws that have created and govern immigrant detention, as well as explains the influence of the private industrial complex on policymaking related to immigration detention.

Understanding the strong link between deportation and immigration detention is fundamental to this paper. As the system operates today, when ICE identifies a deportable individual they take custody of that person and place him/her into immigration detention until their deportation order has been processed. Some non-citizens successfully appeal their deportation or are temporarily released from detention on bail, although both of these are quite rare. To be clear, all persons who are forcibly deported by the United States are detained first; as deportations rise or fall, so do detentions and vice-versa.

2.1 How Did We Get Here?

The History of Immigration Detention

In order to understand the current immigration detention system, it is important know the history behind it. Even though there are centuries of social and political evolution behind current practice, since 1996 there have been especially significant legal developments that have shaped the landscape of immigration detention. U.S. immigrant detention first started in a facility on Ellis Island in 1890 (“The History”), almost 115 years after the Declaration of Independence, although immigration law and deportations on the continent have been around since the early 1600s. About 60 years after the start of immigrant detention on Ellis Island, the passage of the Immigration and Nationality Act

of 1952⁸ saw immigrant detention restricted to “cases in which an individual was a flight risk or posed a serious risk to society” (The History). This limited use of detention remained in practice for about 30 years until President Reagan resurrected the practice of detaining large groups of immigrants via executive order in 1981 (Nofil). It was an apparent political move, not as a response to economic or national security fears, but as a display of power over our own borders (Nofil), exhibited by “establish[ing] control” over rising immigrant populations (Ronald), especially asylum seekers coming from the Cuba and Haiti. As with most executive orders, this was a relatively quiet policy shift, largely hidden from the view of the general public although its ultimate impact was extensive. Shortly after President Reagan began the practice of detaining asylum seekers, private prison corporations Corrections Corporation of America (CCA) and GEO Group Inc. (GEO) were founded in 1983 and 1984, respectively. Under contract with the U.S. government, CCA immediately began detaining immigrants. President Reagan’s detention practices remained largely unchanged for over a decade and ultimately detained a relatively small number of immigrants compared to contemporary detention numbers. It was not until the mid 1990s that immigrant detention truly exploded.

In 1996 the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) passed Congress and were signed into law. These laws were created largely in response to fear about immigrant crime, or more specifically, immigrant terrorism. The AEDPA and the IIRIRA passed a few years after the 1993 World Trade Center bombing and in the wake of the 1995 Oklahoma City bombing, which was initially implied by several news outlets

⁸ Originally vetoed by President Truman as a “discriminatory policy” but passed by the Congress largely in response to domestic fears of Communism (Harry).

to be the work of Islamic militants of Middle Eastern heritage (Johnston). The mid 1990s connected domestic terrorism and immigrants for the first time, an idea that has since been reinforced by September 11, 2001 and the Boston Marathon Bombings in April, 2013. Aside from the Oklahoma City Bombing, all of these acts of domestic terror were perpetrated by foreign-born individuals. The actions of these people have been used as justification for the detainment of non-citizens for national security purposes, extending from the Guantanamo Bay Detention Camp and Abu Ghraib Prison to immigration detention facilities in the United States.

The IIRIRA stipulated mandatory detention not only for asylum seekers, but also for a slew of criminal and drug offenses that belonged to the category of “aggravated felonies” even though some of them are not automatically felonies and many are not necessarily aggravated. Overnight, the law declared many immigrants who were formerly allowed to stay in the United States as suddenly undesirable. The law also expanded the criminal grounds for deportation and allowed for more state and local law enforcement to aid in enforcing the federal immigration law. Simultaneously, AEDPA limited the role of the writ of habeas corpus and expanded the original definition of “aggravated felony,” a term that had originated in the 1988 Immigration and Nationality Act. Aggravated felonies were originally only murder and weapons and drug trafficking, but were expanded so much that some qualifying crimes now include theft, failure to appear in court, and filing a false tax return (“Aggravated Felonies”). A New York Times article, *With Exquisite Cruelty* (see Lewis), published in 1997 lamented the passage of the IIRIRA. The article included an interview with immigration lawyer and author Stanley Mailman who voiced his regret about the law:

The law sets us back 100 years in its disrespect for due process. It is pitiless in barring relief to those who have transgressed the law even in minor ways, including those with dependent U.S. families. Decades of reasonable court decisions have been overturned in the effort to remove from immigration judges the discretion to administer the immigration law with mercy. Worse than the individual hardship is the sacrifice of the system of adjudication that we depend on for fairness.

The passage of these laws affected more than the actual persons targeted in the bills. The laws not only required blind, mandatory detention for any person who met the criteria, but helped create a culture of and capacity for detention as the default measure in enforcing immigration law. Immigration detention has since spun out of control and far overstepped its intended purposes.

2.2 The “Bed Mandate”

In 2011 the Department of Homeland Security (DHS) detained over 429,000 immigrants, the most in history, in over 250 detention facilities nationwide (“Immigration Detention”). At any given moment, around 33,400 immigrants are being held in detention (“Immigration Detention”). This number is the bed capacity of DHS immigration detention facilities, a capacity that is filled at nearly all times. Some immigrants in detention do not have legal immigration status while others have legal status that is in the process of being revoked, either for committing crimes or otherwise violating the Immigration and Nationality Act. These 429,000 detentions, more than

double the number of 202,000 in 2002, cost between \$122-\$167 per person each day, totaling over \$2 billion annually (“President Obama”).

There is a simple, two-part answer for why so many individuals are being detained in the modern era. The first reason is that Immigration and Customs Enforcement (ICE)⁹ *can* detain and deport them. ICE had a budget of nearly \$6 billion in FY 2012 (FY 2012), enough to detain and deport around 400,000 individuals (Morton, “MEMORANDUM”), which the agency did. Secondly, ICE detains and deports so many people because it *must*. In 2006 Congress passed a “bed mandate” requiring ICE to hold a minimum number of individuals in detention at all times (Miroff). By requiring a detention quota, it indirectly creates an accompanying deportation quota. The mandate was passed during President George W. Bush’s administration, but was increased to 34,000 in 2009 after President Obama took office. According to Alabama Republican Representative Robert Aderholt it has since remained at that number “In response to the administration’s repeated attempts to water down enforcement” (Selway), even though deportations remain at all-time highs (see Figure 4). As a reminder of the mandate, in February 2013 Texas Republican Michael McCaul, the Homeland Security Committee chairman in the House of Representatives, told ICE officials that they were “in clear violation of statute” when the detainee population fell to 30,773 after 2,200 people were

⁹ Following the dissolution of the Immigration and Naturalization Service (INS) after September 11, 2001, U.S. immigration enforcement duties were relegated to the Department of Homeland Security (DHS) and split into two agencies: U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Patrol (CBP). CBP patrols and secures the border and almost always returns an immigrant across the border as soon as they are caught attempting to make an unauthorized entry. ICE has authority inside the United States’ borders. Any immigration raid, apprehension, or detention that takes place within the interior of the country is carried out under ICE’s jurisdiction. This paper focuses on ICE and interior enforcement which is the source of immigration detentions and deportations.

released to save money (Selway). The bed mandate is effective at ensuring immigration enforcement and although ICE has pushed back against it, it remains in place.

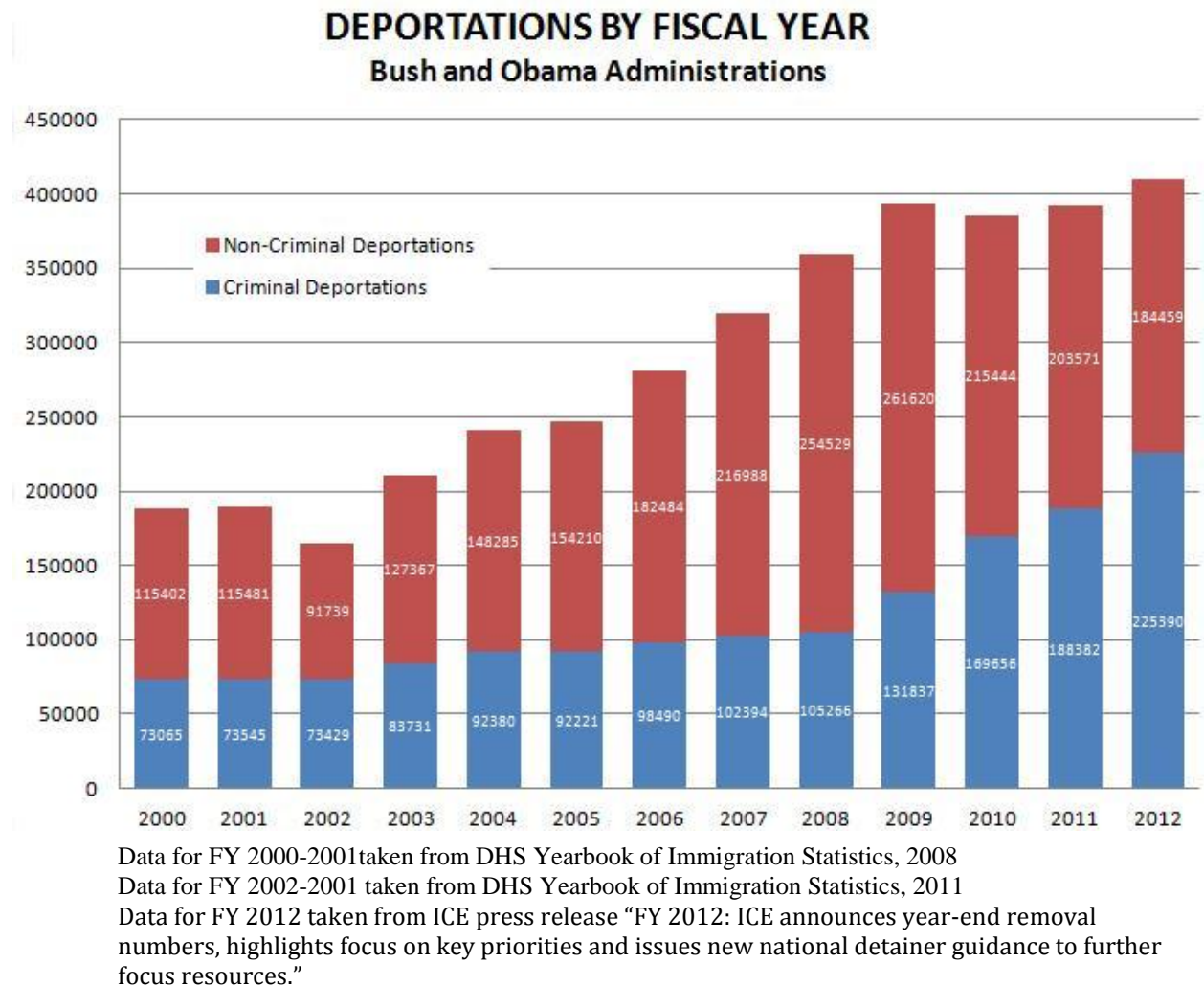


Figure 4

Source: AmericasVoiceOnline.org (see "Deportations")

2.3 The Influence of Private Prison Corporations, Lobbying, and ALEC on Immigration Policy

Over the past several years immigrant detention facilities have been split consistently, almost perfectly evenly, between privately-owned and government-owned detention facilities (usually local or state jails), meaning that in 2011 alone over \$1

billion in tax dollars was spent on private prison contracts to detain over 200,000 immigrants (see previous years' total costs and detention population in Figure 5).

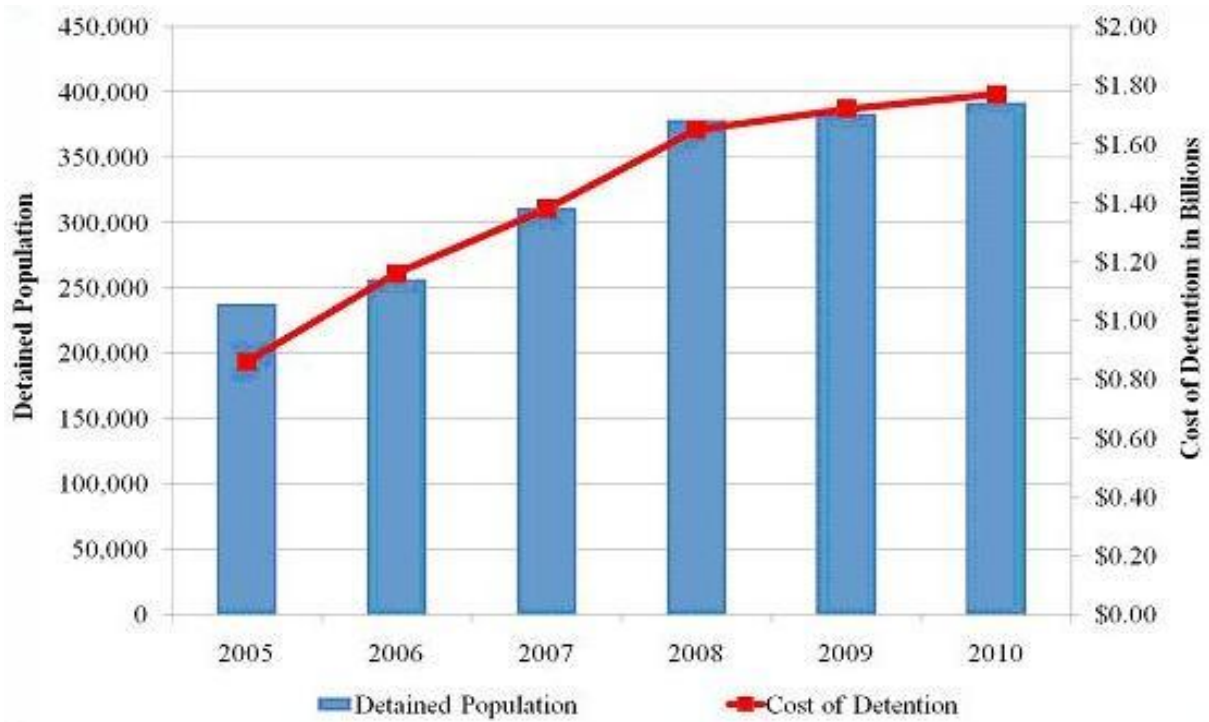


Figure 5

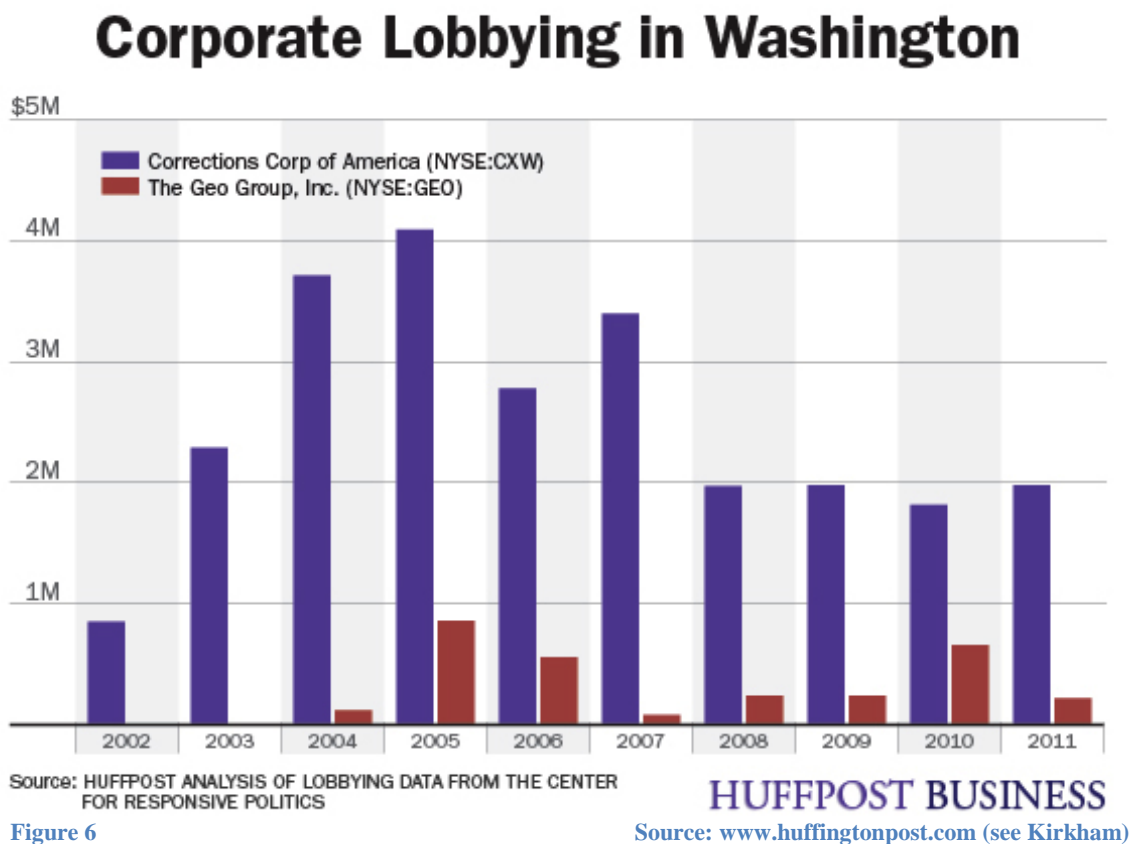
Source: www.detentionwatchnetwork.org (see “The Influence”)

Immigration detention has become a cash cow for the prison industrial complex¹⁰ and has prompted corporations to invest millions of dollars on government lobbying to boost profits. The evolution of contract detention facilities over time, their lobbying records, and profits combine to imply that these corporations have played a pivotal role in immigration detention policy, especially in the last decade.

The Department of Homeland Security (DHS) holds immigration detention contracts with five different prison corporations. By far the two largest contracts are with Corrections Corporation of America (CCA) and The GEO Group Inc. (GEO). CCA, GEO, and the other corporations heavily lobby the government to protect their lucrative contracts and, if possible, to expand the number of immigrant detainees, thus inflating

¹⁰ Detention is also a source of jobs and funding for local governments who contract bed space with ICE.

their profits. Their lobby efforts focus primarily on the U.S. Senate and House of Representatives, where they advocate for specific legislative issues and bills as well as petition select elected officials via campaign contributions. However, their lobbying is not limited to the legislature. Through the use of seven different lobby agencies, sometimes employing five or six at one time, CCA lobbies various federal agencies such as the Department of Homeland Security (including ICE directly), the Department of Labor, the Department of the Interior, the Bureau of Indian Affairs, and the Administration for Families and Children (“The Influence”). They are also directly involved in state politics as major supporters of the Republican Governors Association. CCA, who has the highest contracted bed capacity with DHS, has spent more money on lobbying efforts than any other prison corporation, with lobbying expenditures that total



over \$18 million from 1999-2009, with the highest concentration on the years 2003-2007 during which they spent an average of \$3 million per year (“The Influence”), exemplified in Figure 6. From 2003, the start of the concentrated lobby years, to 2008, the year following the intense lobby period, deportations grew from around 210,000 to 360,000 per year (shown in Figure 4). As explained earlier, deportation rates are tightly correlated with detention rates, and the increases in deportation corresponded to inflated profits for private detention contractors. From 2005 - 2009, GEO received dividends of \$662 for every dollar they spent on federal lobbying while CCA received a return of \$34:1 (Cervantes).

When Congress set the current bed mandate at 34,000 in 2009, CCA had 25 lobbyists representing the company on budget and appropriations issues (Selway). Around that time CCA and GEO targeted key members of the House Appropriations Committee, which appropriates money to ICE and dictates how it will be spent (Selway). Committee Chairman John Carter, a Republican from Texas, was one of the primary beneficiaries of campaign contributions at that time and made a statement about the mandate, saying it “is an instrument to require ICE to actually enforce the law. The [Obama Administration] may want to reduce those levels [of detainees] by releasing dangerous illegal criminals into the streets of America, but I stand firm in my belief [that] we must enforce the laws we have” (Selway). This statement attempts to negate ICE Director John Morton’s directive that instructs enforcement efforts under the Obama Administration to focus on dangerous criminal aliens.

It is time for a brief clarification. Prison corporations are not breaking the law, per se, with their lobbying efforts. They have a right to spend their money to lobby the

different governmental entities of the United States. As discussed so far, there is not a legal issue with the actions of CCA, GEO and others like them. They, like most large corporations, exert their influence to mold the laws in order to increase their profits. From a legal perspective they have done nothing wrong. But from a human and civil rights perspective, the actions of these prison corporations are highly immoral. The private immigration detention system is a perpetuator of structural violence, defined as “harm being done, life being deprived... because of the way things are put together,” a process in which “basic needs are treated as commodities in the marketplace” (Moore). As Dr. Robert D. Hare of the University of British Columbia has said of such large corporations, “the corporation is the prototypical psychopath” (“Who’s Who”), a prototype which includes characteristics such as being forceful, manipulative, egocentric and lacking in deep emotions, empathy, guilt, or remorse (Monahan).

Determining the full impact that corrections corporations have had on the laws and policies governing immigrant detention and deportation becomes more convoluted in the face of their more clandestine operations outside of the traditional lobbying sphere. Evidence of informal relationships and exchanges between government officials and corrections corporations strongly suggests cronyism and potentially corruption. One such custom is for Federal Bureau of Prisons¹¹ (BOP) “directors, who have overseen the transfer of millions of dollars in contracts to the CCA, leaving government and then taking lucrative positions with CCA” (Reynolds). At the very least this appears to be a conflict of interest in which a federal governmental official pumps up business and profits to a corporation before taking a high-salaried position there. Such officials

¹¹ The Federal Bureau of Prisons is a federal executive agency that oversees all federal prisons in the United States including non-ICE owned nor contracted immigrant detention centers.

ostensibly get paid with the very contract money that they secured in the first place while working for the government, begging the question of whether the official was acting in the interests of the government and the people, the private corporation, or him/herself.

CCA and other prison corporations have expanded their influence to state governments as well, an arena in which they receive considerably less oversight than their formal lobbying on the federal level. According to its website, the American Legislative Exchange Council (ALEC) is “the nation’s largest, non-partisan, individual public-private membership association of state legislators... [that] works to advance the fundamental principles of free-market enterprise, limited government, and federalism at the state level....” The organization, registered as a 501(c)(3) non-profit, is a key partner in prison corporations’ self-promotion at the state level. In describing this organization, the *New York Times* stated that “special interests effectively turn ALEC’s lawmaker members into stealth lobbyists, providing them with talking points, signaling how they should vote, and collaborating on bills affecting hundreds of issues like school vouchers and tobacco taxes” (McIntire). *Business Week* published that “part of ALEC’s mission is to present industry-backed legislation as grass-roots work” (Greeley). The members that comprise ALEC are described most simply in *The Nation* as a “collaboration between multinational corporations and conservative state legislators” (Nichols). ALEC’s efforts have been identified as a driving force behind a number of controversial state legislations including stand-your-ground laws, voter-ID laws, minimum and extended prison sentencing, and immigration detention. ALEC operates by recruiting state-legislators, corporate members like Bank of America, Wal-Mart, Pfizer, and Verizon, and public members (who are often lobbyists). Prison corporations GEO and CCA are also on the

list of corporate members. Membership to ALEC requires an annual membership fee, \$50 for legislators and at least \$7,000 for private-sector members, some of whom paid up to \$398,000 in 2012 (McIntire). Over 2,000 of the total 7,382 state legislators (27%) in the U.S. are members, as well as at least 300 private corporations (“What is ALEC”). Throughout the year ALEC holds conferences that have corporate member-funded “scholarships” for legislators, including a four day retreat that includes \$250,000 worth of daycare for members’ families (McIntire). During their conferences, ALEC splits its members into eight issue-based task forces that are each lead by one legislator and one private-sector member (McIntire). Task forces draft model legislation that legislators can take home and introduce in their state legislatures. According the resident director of ALEC’s Public Safety and Elections Task Force, any bill submitted by a legislative or corporate member must be reviewed by both the public and private sector ALEC members before it can become model legislation (Hodai). In many instances, legislators return home with bill language that was originally drafted by corporate lobbyists or lawyers and submit the bill to the state legislature as their own. In fall 2011 Florida State Rep. Rachel Burgin introduced a resolution that was copied verbatim from legislation

1	House Memorial
2	A memorial to the Congress of the United States,
3	urging Congress to cut the federal corporate tax rate.
4	
5	WHEREAS, it is the mission of the American Legislative
6	Exchange Council to advance Jeffersonian principles of free
7	markets, limited government, federalism, and individual liberty,
8	and

Figure 7

Source: ThinkProgress.org (see Seitz-Wald)

covertly drafted using input from ALEC-corporate members. ALEC's influence on the bill was easy to uncover because the first sentence Rep. Burgin's bill was the ALEC mission statement (see Figure 7). The bill was quickly withdrawn and resubmitted with more proper bill language (Seitz-Wald).

Although secretive in the details of its operations, ALEC touts a very successful legislative track record boasting "that it has over 1,000 of these bills introduced by legislative members every year, with one in every five of them enacted into law" ("What is ALEC"). While ALEC focuses on state government, it is venturing into the arena of federal lawmaking by maintaining relationships with its alumni, 82 of whom currently serve in the U.S. House of Representatives and 11 in the U.S. Senate, according to their website. Little is known about ALEC's state-level operations, but the dealings and influence that exist between ALEC and their members in the U.S. Legislature are even more clandestine.

Many of the 200-or-so ALEC bills passed annually in state legislatures influence the laws and practices concerning immigration detention. In the same spirit as their federal lobbying, CCA and GEO get returns on their investments in state level politics. The most famous (or infamous) example of ALEC influence in the realm of immigrant detention was in Arizona in 2010 in the shape of The Support Our Law Enforcement and Safe Neighborhoods Act, commonly known as SB 1070. This bill was passed by the Arizona legislature and signed into law amid a national uproar of controversy and debate. The law would have essentially made federal immigration crimes illegal on the state level and opened the door for law enforcement officers to make lawful stops and arrests based on profiling a person's physical appearance, both of which would have created more

immigration detainees. An injunction issued by a federal judge among a flurry of constitutional challenges filed by several bodies including the ACLU and the U.S. Department of Justice prevented the law from taking effect. Ultimately the constitutional challenges propelled the law to the U.S. Supreme Court in *Arizona v. United States* (567 U.S. 11-182). The case involved challenges to four key provisions of the bill: (a) the creation of a state-crime for violation of federal registration laws, (b) the creation of a state-crime for working without authorization, (c) the requirement to verify citizenship of all detained persons, and (d) the authorization for police officers to make warrantless arrests based on probable cause of removability from the United States (ARIZONA). Of the four provisions, only provision (c) was upheld, labeled as “constitutional on its face” (ARIZONA). Ironically enough this provision was one of the most controversial of the law, with critics citing the possible racial profiling by law enforcement that could flourish under the provision. In his majority opinion Justice Kennedy noted that officers operating under provision (c) may not consider race during a citizenship check and that even though the law might be constitutional, its application and enforcement may not be just.¹²

Before SB 1070 was even enacted, Arizona Governor Jan Brewer received “substantial campaign financing from top CCA executives” and had already hired two former CCA lobbyists as top aides (Cervantes). Even before taking office Gov. Brewer herself was an ALEC member (Fischer). In response to the constitutional challenges that barred the implementation of the law, the Republican Governors Association, which had

¹² These words of caution hearken back to another landmark Supreme Court case concerning discrimination against immigrants, *Yick Wo v. Hopkins* (118 U.S. 356 (1886)), that found that even though a law may be constitutional in design, an unequal enforcement of the law contrived so as to target on specific group or class of people is unconstitutional in itself.

already received over \$160,000 in contributions from CCA and GEO that year, sent out a nationwide solicitation asking for contributions to fund judicial actions in support of the law (Fischer). The non-profit organization, The Center for Media and Democracy, has chronicled the path of SB 1070 through ALEC, the Arizona State House, and onto the desk of Governor Brewer. Their research (see Fischer) shows that SB 1070's primary sponsor, Arizona Senator Russell Pearce, had tried to pass similar legislation every year from 2005-2009. In late 2009, with a new Republican governor who was a former ALEC member, Senator Pearce took his model legislation to an ALEC conference for assessment, rewriting, and corporate endorsement. A few weeks later the "No Sanctuary Cities for Illegal Immigrants Act" came out of the ALEC Public Safety and Elections Task Force.¹³ In total about 50 people, including CCA officials (Sullivan), were involved in the drafting of the model bill. Just weeks later, SB 1070 was introduced into the Arizona Legislature. The bill was co-sponsored by 36 legislators, 24 of whom were associated with ALEC and 30 of whom quickly received campaign contributions from prison lobbyists or companies, including GEO and CCA (Sullivan). One month before the bill was introduced, in December 2009, three GEO Executives and one of their spouses each made maximum campaign contributions of \$410 to Arizona House Speaker Kirk Adams, who would later go on to support the House version of SB 1070 and preside over its passage (Hodai).

Overall, it appears that SB 1070 was passed entirely because of the lobbying influence of prison corporations. Senator Pearce had tried and failed in four successive years to pass such legislation, each time failing to garner enough support from his

¹³ This task force has since been disbanded amid controversy and withdrawals of corporate sponsorship following the exposure of ties between ALEC and SB 1070. Without the Public Safety and Elections Task Force ALEC has eight remaining task forces.

democratically elected colleagues. The bill quickly passed after consulting with ALEC and its corporate prison representatives, redrafting legislation with their input and blessing, and then introducing the bill to a legislative body in which several members received campaign contributions from CCA and GEO in exchange for sponsoring the bill. The private prison corporations saw an opportunity to create more detainees and they successfully used their resources to make the bill law.

A lawyer for ALEC has acknowledged that the group's surreptitious interactions with lawmakers could fit the federal definition of lobbying, save for a provision that exempts such interactions when they are the product of "non partisan research and analysis" (McIntire). However, in order qualify for this technicality, ALEC must prove itself to be non-partisan. A simple look at the group shows that of 104 leadership positions, 103 are filled with Republicans and the policies that they support "are nearly uniformly conservative" (McIntire). Unless consistent promotion of conservative policies and over 99% Republican leadership qualifies as non-partisan, then ALEC is lobbying illegally. More explicit than the elusive definitions of lobbying, under federal tax law a 501(3)(c) organization like ALEC may not participate in the formation of legislation (Hodai). One Arizona legislator, Steve Farley, was so concerned about the group's influence that he introduced the ALEC Accountability Act with this rationale (see The United States of ALEC):

I just want to emphasize it's fine for corporations to be involved in the process. Corporations have the right to present their arguments, but they don't have the right to do it secretly. They don't have the right to lobby people and not register as lobbyists. They don't have the right to take people away on trips, convince

them of it, send them back here, and then nobody has seen what's gone on and how that legislator had gotten that idea and where is it coming from. All I'm asking... is to make sure that all of those expenses are reported as if they are lobbying expenses and all those gifts that legislators received are reported as if they're receiving gifts from lobbyists. So the public can find out and make up their own minds about who is influencing what.

The daily capacity of immigration detention has risen 72% since 2001 (Siskin). The various pieces of evidence, from federal lobbying to state level ALEC partnerships, combine to form a compelling argument that in recent years prison corporations have been successfully exerting their influence to impact the laws governing immigration enforcement in the United States. They have tried, and often succeeded in increasing the numbers of immigrants that they can detain in their contracted facilities.¹⁴ Although the impact appears to be widespread in immigration law and enforcement policies, the exact locations where it manifests are difficult to identify.

¹⁴ In many cases immigration offenses, violations of the Immigration and Nationality Act (INA) like illegal reentry, are criminal in nature and thus punishable with prison and a fine. In some instances INA violations are civil in nature and punishable by fine only, such as failure to depart (U.S.C. 8 §1324D). In other cases, non-citizens violate the INA by committing crimes within the country, in which case their criminal prosecutions (with any resulting prison) and immigration prosecutions are conducted separately. After deportable criminals have served any prison sentences for committing crimes, they are turned over to ICE. If only a civil violation of the INA, the individual is booked directly into ICE custody. ICE places immigrants into detention while processing their deportation. In some cases, this allows prison corporations to double dip, by holding an immigrant first in their prison and then in their prison-like immigration detention.

Part Three: Strategic Immigration Enforcement

This section addresses how the Obama Administration has responded to the immigration enforcement “bed mandate” quota by focusing efforts on violent and dangerous immigrants. However, all three local enforcement programs, CAP, 287(g), and Secure Communities appear to deviate from ICE’s focused enforcement goals. Studies into their operative procedures show evidence of abuse of authority, racial profiling, and wrongful arrests. This manner of enforcing immigration law has resulted in an immigration detention system in which only about 11% of detainees have committed violent crimes (Letter from).

3.1 Enforcement Directives in Response to the Bed Mandate

While serving as Director of the Department of Homeland Security, Janet Napolitano, called the detention bed mandate “artificial... an arbitrary bed number” and said “we ought to be detaining according to our priorities, according to public-safety threats, level of offense and the like, not an arbitrary bed number” (Selway). In response to the mandate, the Obama administration has directed its enforcement agents to focus their limited resources on catching and removing criminal aliens, as a way of most fairly enforcing the mandate. Directives, such as those from ICE Director John Morton, clarify that interior enforcement should focus on *violent* criminal aliens, those who pose a dangerous threat to civil society. Individuals of highest priority are “Aliens who pose a risk to national security or public safety...[including] aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders...[and] aliens who otherwise pose a serious risk to public safety” (Morton, “MEMORANDUM”). This

enforcement strategy is fair and logical, and statistics show that criminal deportations comprise a greater share of the annual deportations and detentions (refer to Figure 4 for deportation statistics).¹⁵

However, in the face of record deportations, immigrant advocates claim that the criminal alien enforcement policies have become unfair and discriminatory and that many criminal detentions and deportations are of non-violent individuals (Shear). Despite specific enforcement guidelines and statistics that would seem to suggest otherwise, detentions and deportations of criminal aliens rarely follow the ICE directives to focus on violent and dangerous individuals.

3.2 The Definition of “Criminal” Aliens

On multiple occasions the Obama Administration has affirmed that the enforcement of our immigration laws should focus primarily on “criminal aliens” (Caldwell). This term will usually conjure up images of deporting non-citizens who commit murders, heinous assaults, violent robberies, kidnappings and the like, as the aforementioned ICE directive. In fact, in a speech President Obama said, “We are deporting those who are here illegally. But I want to emphasize we’re not doing it haphazardly... We’re focusing our limited resources and people on violent offenders and people convicted of crimes, not just families, not just folks who are just looking to scrape together an income” (“Remarks by”). However, remarks like these are misleading, and problems with concentrating enforcement on this area have surfaced because there is not

¹⁵ Notice in Figure 4 that the increases under the Bush administration were non-criminal immigrants, and under the Obama administration the increases were criminal immigrants. As this paper will discuss later, this shift in demographic is not entirely based on a change in the type of detainees, but rests heavily on a loose definition of “criminal alien.”

an agreed-upon definition of what constitutes a “criminal alien.” The definition in the minds of the general public and the working definition used by ICE are often far removed from each other. This is an important gap not only because the people are the ultimate source of power and accountability for the government, but because the deportation of criminal aliens is an often cited statistic in the immigration policy debate, especially in defense of persistent immigration enforcement, just as President Obama continued in his speech, “as a result, we’ve increased the removal of criminals by 70 percent.”

ICE counts every non-citizen with any criminal conviction, even misdemeanor traffic violations, as a criminal alien. In the agency’s published deportation statistics, it does not distinguish among criminal aliens based on the severity of their crime, but only whether a crime has been committed (and under which category of the law such as traffic or drugs, in more detailed reports). Therefore, if the Department of Homeland security publishes that it deported 200,000 criminal aliens in a year, 80% of them can simply be bad drivers. Thousands and thousands of people are detained (and most of them deported) every year based on the “criminal” label, but most of them have never harmed or endangered U.S. society.

ICE regularly labels a person a “criminal alien” simply because they have violated the Immigration and Nationality Act by illegally crossing the border.¹⁶ These individuals have lived perfectly within the law since they crossed into our country. Prosecutions for illegal entry and illegal reentry have risen 1,400 and 300 percent, respectively, in the last 10 years (“US: Prosecuting”). Not only is illegal reentry now the most common federal immigration charge, but it is the most prosecuted federal crime (Anton). This means that

¹⁶ It is a criminal act to enter the country illegally, but only a civil offense to be present in the country illegally (“Is Immigration”).

the offending individuals are not simply removed from the country as was common in the past, but now immigrants are being prosecuted for these immigration crimes, serve prison sentences, and then after “paying their debt to society” are still deported. In 2011, nearly 20% of Department of Homeland Security “criminal” removals were the result of immigration offenses (Simanski). This means that in one out of every five criminal deportations¹⁷ the “criminals” did no harm to our country except by entering it or by staying here longer than they were originally permitted. Illegal reentry criminal prosecutions have been on the rise and have surpassed illegal entry criminal prosecutions (Simansky), meaning that at least 17,000 people were deported from the U.S. as a result of returning (or trying to return) to lives that they had previously established in the country. It is safe to assume that illegal reentry is most often a return to an established life in the United States. A Pew Research study on undocumented immigrants in 2011 found that 85% have been in the United States for five years or more (Skerry). The act of illegal reentry does not only apply to a person who was undocumented when they were deported from the U.S. the first time; it applies to anyone who has returned to the U.S. after being forcibly removed, for instance a person who had legal status but was deported after overstaying their visa. Still the Pew study does provide insight. In cases when an illegal reentrant was undocumented the first time around, there is an 85% chance that they had already been residing in the U.S. for at least five years.

Fiscal year 2012 saw over 80,000 new criminal convictions on the same immigration charges (“US: Prosecuting”). These individuals are not deported until after they have served the prison time required for their criminal conviction(s) which, in

¹⁷ According to official statistics, criminal deportations currently constitute about half of all removals from the U.S. However, most of them are not violent or dangerous.

addition to the injustice, also contributes to an already crowded penal system. Illegal entry is a misdemeanor, with a maximum prison sentence of six months. A second illegal entry used to carry a prison sentence up to two years, thus classifying it as a felony, until the passage of the Violent Crime Control and Law Enforcement Act of 1994 (commonly known as the Assault Weapons Ban). This act increased the maximum penalties for illegal reentry to 10-20 years in prison, depending on the specifics of the original removal. The Act also classified it as an aggravated felony, providing for expedited deportation which is not subject to judicial review. All of these immigration convictions boost ICE's deportation statistics of "criminal aliens," increase the prison population, and severely punish individuals who have not necessarily committed any other crime, much less a violent one. In these cases, the long prison sentences and automatic deportations appear to be far more severe retributions than the original border crossing.

Drug offenses and traffic offenses, both of which qualify the offender as a criminal alien, each accounted for 43,000 deportations in 2011 (Simanski). These categories are both unique in their criminal nature because they do not necessarily affect people aside from the perpetrator. For instance, more than four-fifths of drug related arrests are only for possession (Drug Law). ICE views all drug offenses seriously, even though they are usually not grave and despite the fact that a lot of the country has shown leniency on drug related charges. Municipalities in every U.S. state recognize the unique, non-threatening nature of drug offenses through their use of specially designated drug courts ("Drug Courts"). Drug courts acknowledge the unique nature of drug crimes and substance abuse, and aim to rectify most drug convictions through drug treatment and community service, not harsh and ineffective penalties like prison. The district attorney's

office in Denver, CO endorses the Denver Drug Court saying that, “It is a specialized court designed to give offenders the responsibility of their substance abuse problem through probation supervision and close judicial oversight. In doing so, Drug Court encourages public safety and individual responsibility, a reduction in crime and an improvement in the quality of life for the participants and their families” (“Denver Drug Court”). Most of these drug offenders have not physically harmed anyone but themselves. Additionally, drug use is not necessarily harmful as entire state governments in Colorado and Washington now allow certain amounts of marijuana possession for recreational purposes. Minor drug possession is not a behavior that our nation views as morally deplorable enough to imprison people, let alone remove them from the country. Nonetheless, despite legal and judicial approaches across the country, all drug crimes are used as rationale for deportation and included in the “criminal alien” category. A report by the Center for Criminal and Juvenile Justice found that a having a prior conviction for a traffic offense or the possession of less than one ounce of marijuana was more likely to lead to an undocumented immigrant’s detention than a prior rape, homicide, robbery, or aggravated assault conviction (Males).

The enforcement focus on “criminal aliens” is very significant because, as mentioned before, 80,000 criminal deportations each year (and rising) affect immigrants who may not have committed any crime aside from entering the country. They are not the violent and dangerous criminals whom ICE claims to prioritize. *Essentially 80,000 aliens are deported annually on criminal grounds that are not based on behavior or character, but on migration patterns.* These people are deported as criminals without any evidence that they conducted themselves any differently than every law abiding U.S.

citizen. Furthermore, if you assume that half of drug and traffic related crimes were not violent or harmful to other people (a conservative estimate), the total number of individuals deported on non-dangerous, non-violent but still criminal grounds topped 150,000 a year in 2011-12. This number equates to at least 43% of all criminal deportations carried out against non-violent, non-dangerous, non-threatening “criminals.”

3.3 Local Law Enforcement Partnerships in Criminal Alien Enforcement Programs:

CAP, 287(g), and Secure Communities

In order to better focus immigration enforcement on “criminal aliens” the Obama Administration has relied heavily on partnerships between ICE and state/local law enforcement agencies. These partnerships exist with the goal of catching and deporting criminal aliens, and provide far more man-power to enforce immigration laws than ICE can provide on its own. The partnerships function in the form of three programs, the Criminal Alien Program (CAP), Secure Communities, and Section 287(g) of the INA (see Figure 8 for an overview of criminal alien enforcement programs). The reliance on these partnerships has grown substantially under President Obama, marking a departure from Bush-era immigration raids. In all of these programs, deportable individuals are identified following contact with local law enforcement, at which point ICE issues immigration detainers (also known as ICE detainers). These detainers essentially function as formal requests from ICE to local law enforcement asking that they detain the individual for up to an additional 48 hours after the end of local jurisdiction (excluding weekends and holidays) until ICE can take custody. A detainer signifies that ICE suspects that the individual is deportable and that an investigation into their deportation

status has begun. After ICE takes custody, they place the individuals into federal immigration detention¹⁸ to wait out their deportation proceedings.

ICE's Primary Criminal Alien Enforcement Programs					
	Jail Enforcement Programs			Task Force Programs	
	CAP	Secure Communities	§287(g)—Jail Enforcement	§287(g)—Task Force	NFOP
Who makes the arrest?	State or local law enforcement agent (LEA)	LEA	LEA	ICE or LEA, with ICE training and supervision	ICE
Who conducts the immigration screening or selects the enforcement target?	ICE	ICE	LEA, with ICE training and supervision	ICE or LEA, with ICE training and supervision	ICE
When does immigration screening/targeting occur?	During booking and post-conviction	During booking	During booking	Pre-arrest through booking	Pre-arrest through post-release
How many jurisdictions/task forces are operating?^a	More than 1,200 CAP officers monitor over 4,300 facilities	3,074 jurisdictions in 50 states	40 jurisdictions in 19 states	25 jurisdictions in 13 states	104 teams

Source: CRS Analysis of ICE programs. Secure Communities jurisdictions data as of August 22, 2012, from ICE, "Activated Jurisdictions," <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>; §287(g) jurisdictions data as of October 16, 2012, from ICE, "287(g) Results and Participating Entities," <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa>.

Notes: **CAP** refers to the Criminal Alien Program; **NFOP** refers to the National Fugitive Operations Program; **287(g)** refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs; **LEA** refers to law enforcement agent; **ICE** refers to the U.S. Immigration and Customs Enforcement agency.

a. Number of jurisdictions as of March 2012 for CAP, August 2012 for Secure Communities, October 2012 for the §287(g) program, and March 2012 for NFOP. The reported number of §287(g) task forces counts 8 hybrid programs as both jail enforcement and task force models; as of October 13, 2011, ICE has §287(g) agreements with a total of 57 law enforcement agencies in 21 states.

Figure 8

Note: NFOP is an ICE criminal enforcement program that does not partner with local law enforcement.

The Criminal Alien Program, or CAP, operates in every federal and state prison across the country, as well as in over 300 county jails. The purpose of the program is to

¹⁸ Although immigration detention is carried out by the federal government, it is largely administered through contracted municipal and privately owned prisons.

identify deportable non-citizens who have criminal records. It is responsible for detaining the most removable individuals, having been credited with the identification of 48% of all removable individuals detained by ICE in 2009 (“The Criminal”). While the mission statement and perceived purpose of the program are to focus enforcement efforts on dangerous criminals, there is severe controversy over whether the program is fulfilling its obligations. Critics of the program caution about the possibility that the program allows law enforcement officers to make arrests based on racial profiling. A report published by the Department of Homeland Security in 2009 found that 57% of immigrants detained as a result of CAP had no criminal convictions, having only been charged with a crime (Waslin). Furthermore, the study looked at one county in Texas and found that of their immigration detainees, 58% were placed on individuals who were only charged with misdemeanors.

In general, all of CAP’s operations are shrouded in a conspicuous amount of secrecy. There has been such a lack of transparency that several prominent immigration legal bodies united to file a lawsuit¹⁹ against the DHS to provide more information about dealings and the outcomes of the program. The lawsuit by the American Immigration Council, the Immigrant Rights Advocacy Clinic of Yale Law School, and the American Immigration Lawyers Association was successful. The court-approved settlement requires that ICE begin to publicize formerly confidential records by late October 2013 including (see “Uncovering”):

- Information about CAP policies, implementation, and operation such as interviewing procedures and arrest quotas.

¹⁹ *American Immigration Council, et al., v. DHS*, No. 12-00355 (D. Conn. filed Mar. 8, 2012)

- Information about the relationship between CAP and other of the agencies programs.
- Information about racial profiling within the implementation of the program; and
- Reports of all encounters between agency officials and people that have fallen under the program since 2010.

The American Immigration Council will review and analyze the records. Given the covert nature of the CAP program, allegations of racial profiling, and apparent straying from the purpose of identifying convicted immigrants, this new information has the potential to expose around 50% of all deportations – perhaps as many as 200,000 annually – as flawed.

The IIRIRA of 1996 included section 287(g), which created another program that operates in local jurisdictions. The 287(g) program allows the federal government to create agreements with state and local law enforcement agencies and grant them authority to enforce the federal immigration law. After receiving training from ICE agents, local law enforcement officers have the authorization to identify, process, and detain immigration offenders that they encounter while fulfilling their normal law enforcement duties. The actions of local law enforcement under 287(g) are authorized pursuant to memoranda of agreement between the local jurisdiction and the federal government, with all additional costs paid by the local enforcement partner. This program remained unused for its first six years of existence, until after September 11, 2001. In 2002 the State of Florida was the first government to sign up for the program and Alabama followed suit in 2003. At the beginning, the memoranda of agreement were constructed on a case-by-case basis, allowing for different standards and practices across the various jurisdictions. This

allowed different jurisdictions to tailor how - and on whom - they would enforce immigration law. This freedom was exploited to create, almost exclusively, municipalities that set their own enforcement priorities and operated all but independently from ICE. By September 2006 there were seven participating jurisdictions. One of those, Mecklenburg County, NC joined 287(g) in February of that year with the goal of “apprehending as many unauthorized immigrants as possible” (Capps). Their efforts in identifying individuals for deportation ended up being so overwhelming that the DHS “had to reassign ICE agents to deal with the numbers” (Pendergraph).

In 2007 the Sherriff of Mecklenburg County, Jim Pendergraph, became the head of ICE’s Office of State and Local Coordination. Under his tenure from 2007 to 2008, ICE entered into 55 new 287(g) agreements, all of which echoed the language used in the Mecklenburg County Memorandum of Agreement (Capps). According to an ICE fact sheet in 2007, the 287(g) program was intended to focus on “violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling, and money laundering,” and “is not designed to allow state and local agencies to perform random street operations” (ICE, “Delegation”). The next year, the limiting, and clarifying language did not appear in the fact sheet (“Delegation of”), indicating that 287(g) had changed in policy, practice, and in public communication. The inference is that in many of these jurisdictions racial profiling became an issue and local officers were apprehending individuals for petty, negligible offenses. That year turned out to be the height of the program, with 287(g) accounting for over 45,000 identifications (Vaughn).

In July 2009 DHS Secretary Janet Napolitano announced that ICE would standardize the Memorandum of Agreement used in all existing and future 287(g) agreements. At the time ICE had entered into at least 62 agreements with local law enforcement agencies under 287(g). The move was intended to provide consistency across all jurisdictions and to re-focus the priorities of the program on dangerous aliens, specifically by discouraging arrests “for minor offenses as a guise to initiate removal proceedings” (Secretary Napolitano). As with most ICE memoranda, this directive did not dictate a full departure from old practices. The memo discouraged low-priority arrests, but did not enforce it among its officers, effectively making it a suggestion than a hard rule of policy.

Traditionally 287(g) has two kinds of agreements, task force and jail enforcement. The task force program allows officers to interrogate individuals in the field while the jail enforcement program only allows immigration interrogation to take place after an individual has already been arrested and detained for a local or state crime. However, jail enforcement programs do not necessarily preclude officers from making arrests primarily on suspicion of immigration status, or more accurately, for personal motives. For instance, all an officer needs to do is follow a person suspected to be an undocumented immigrant in the car for as long as possible until the driver does not make a complete stop at a stop sign, slightly exceeds the speed limit, or commits some other arbitrary offense. The officer can use their discretion as rationale for placing the individual into custody. The heavy criticism against 287(g) in recent years has lead to several investigations into its operations. The findings of the studies cover various topics including racial profiling, civil rights violations, selective enforcement of the law, the

program's impact on community safety, cost to local law enforcement, and the levels of federal oversight. Some of the most important findings are:

- The Department of Justice (DOJ) found that 287(g) participating municipality, Maricopa County, AZ, routinely engaged in unconstitutional policing practices and in racial profiling of Latinos that included unlawful stops, detentions, and arrests of Latinos. Furthermore, the Maricopa County Sheriff's Office (MCSO), a jail-only enforcement program of 287(g), regularly conducted "sweeps" in the community. In parts of the county Latino drivers were nine times more likely to be stopped than non-Latino drivers (Perez).
- In 2006-07, MSCO arrested 578 undocumented immigrants through traffic stops. Of those, 498 of them received a single charge: conspiracy to smuggle themselves. Since participating in 287(g), Maricopa County 9-1-1 call response times have increased (Gabrielson).
- Another DOJ investigation discovered that the Alamance County Sheriff's Office in North Carolina, a jail enforcement only jurisdiction, also engaged in unconstitutional detentions and arrests. In Alamance County the local police erected check points at entrances to Latino neighborhoods. The report described how Latinos were arrested for traffic violations that only resulted in citations for others and were ten times more likely to be pulled over than non-Latinos (Perez).
- The Brookings Institution reported on the additional costs of the program to local law enforcement and found that Prince William County, VA spent \$6.4

million to run 287(g) in its first year and had to raise property taxes and draw from the county budget to cover the costs (“The 287(g)”).

- The findings of a University of North Carolina report show that in a majority of cases, North Carolina 287(g) jurisdictions arrested and detained individuals who posed no threat to public safety. For example, in May 2008 in Gaston County, NC (another jail enforcement only jurisdiction) 83% of arrests made pursuant to 287(g) were for traffic violations (Wiessman). Another UNC report chronicles how a Latino gunshot victim called the police for help and was arrested and deported for giving the wrong address of the crime scene. A few months later five Latino men were deported after being arrested for fishing without a license (Nguyen).
- The Government Accountability Office concluded that 287(g) suffers from a grave lack of oversight. ICE is partly to blame for abuses of authority under 287(g) due to their lack of clearly defined program goals and for not adequately supervising the local law enforcement agencies (United States).
- A report by the research group Justice Strategies found that 87% of jurisdictions participating in 287(g) had a higher-than-normal Latino population growth rate (“Local Democracy”).

These studies clearly indicate abuses of authority and racial profiling (although not all 287(g) programs operate unlawfully). These findings should not be too surprising. The program offers unsupervised authority to enforce the federal immigration laws but gives no compensation for the unrecuperated time and financial costs of said enforcement. The only motivation to participate in the program seems to be the extra authority to locally

enforce national immigration laws, which is already done by the federal government. Who do you expect to sign up? It should not be surprising that this program begot practices of unlawful detentions and arrests. It has basically served as a free pass for those who aim to rid their communities of the foreign-born population. Still, potential financial motivators for municipalities exist, although it is impossible to determine whether – and how much – they influence detention contracting with municipal governments. These economic motivators can include donations or campaign contributions from prison corporations, or even a promise from one of the companies to open a new facility in the local area – a huge source of jobs and a boost to many political resumes.

**Fugitive Operations Team Apprehensions,
Mid 2003 – February 2008**

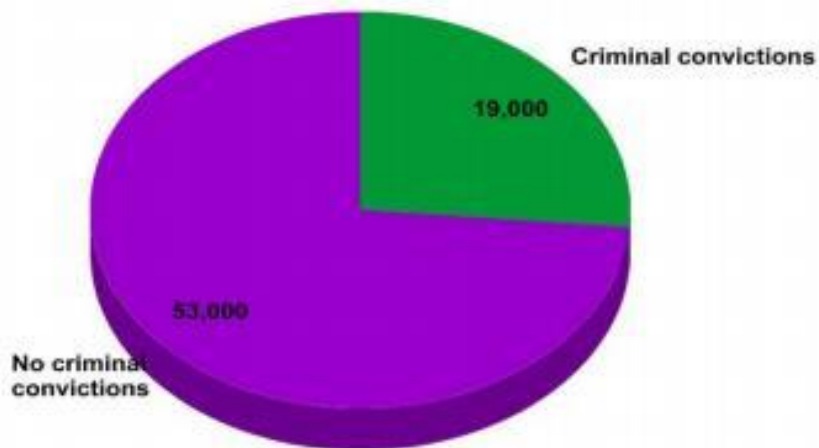


Figure 9

Source: www.migrationpolicy.org (see Mendelson)

Data from 2003-2008 shows that Fugitive Operations Programs predominantly apprehended non-criminals.

No matter the reasons municipalities have for participating in the program, 287(g) is unmistakably a boon for privately owned detention facilities by providing another

enforcement mechanism for detaining immigrants. With traffic stops used to detain and deport non-citizens, there is an almost inexhaustible pool of potential detainees. As Kenneth Smith, special agent in charge of ICE's Atlanta office said, the program "would not necessarily have a huge impact on the criminal system," but that "it certainly would on our detention and removal capabilities" (Smith).

At any time, either party of a 287(g) agreement can choose to withdraw from it. In some cases the agreements simply expire and are not renewed. The Obama administration has reined in the use of 287(g) programs, allowing all of the task force agreements to expire at the end of 2012. Currently, there are 36 active 287(g) agreements operating in 19 states across the country, all of which are jail enforcement only programs ("Fact Sheet") down from the 69 active agreements in 2011 ("The Performance"). These include one active jurisdiction in Colorado, El Paso County, home to Colorado Springs. The reason for the phase-out of the program is twofold. Not only are the legality and ethics of the program under scrutiny, but the program is now widely considered obsolete in immigration enforcement circles, with deference given to another program, Secure Communities.

The Secure Communities program also functions through cooperation between local and state law enforcement and Department of Homeland Security. For years, when local jurisdictions have taken custody of an individual, their fingerprints get sent to the FBI to get crosschecked against criminal databases in order to see if they have a previous criminal record. Under Secure Communities the local authorities still submit the fingerprints as normal, but when the FBI receives fingerprints they also send them to the DHS to check against immigration databases. This program allows ICE to identify

individuals who are deportable either on criminal grounds or because of immigration status. Unlike 287(g) in which local authorities have the power to conduct the immigration screenings, Secure Communities preserves the control of the federal immigration law with the federal government. It also does not add an extra burden of enforcement nor extra costs to local enforcement agencies the way that 287(g) programs can do, but it does require extra costs from the local municipality when there is a database match and ICE issues an immigration detainer asking that an individual remain in local custody for an extra 48 hours.

The Secure Communities program was created in 2008, at which point it underwent a probationary period in 14 volunteer pilot jurisdictions. The Obama administration has rapidly expanded the scope of the program and as of January 2013, Secure Communities database sharing is active in all 3,181 local law enforcement jurisdictions in all U.S. states, territories, and Washington D.C. (“Secure Communities Activated”). Through May 2013 the program had identified and removed over 279,00 individuals to date (“Secure Communities Monthly”), with arrest numbers increasing annually.

With the program’s authority reaching the entire U.S., concerns from its critics have grown. Questions about its efficacy, legality, and unintended consequences have been best addressed in a comprehensive report published in 2011 by the UC Berkeley Law School’s Warren Institute on Law and Social Policy, with some very surprising findings (see Kohli):

- Approximately 3,600 United States citizens have been wrongfully detained by ICE as a result of the Secure Communities Program.

- More than one-third of arrestees reported having a U.S. citizen spouse or child, meaning that around 88,000 families with U.S. citizen members have been affected by the program.
- Only 52% of all detainees identified by the program are scheduled to have a hearing in front of an immigration judge. This statistic is the product of speedy, informal removals which will be discussed in the next section of this paper.
- As of mid-2011, 93% of the program's undocumented immigrant arrests were of Latinos even though they only comprise 77% of the undocumented population.
- Of all deportable individuals identified by the program, 83% are placed into ICE detention compared to an overall DHS immigration detention rate of 62%.

In a brochure about the program, ICE claims that Secure Communities “prioritizes the removal of criminal aliens by focusing efforts on the most dangerous and violent offenders” (“Secure Communities A Modernized”). Secure Communities uses a classification system to rank the severity of crimes that detainees have been accused of committing. In literature disseminated to state and local authorities, the DHS describes the different levels as (see “Immigration and”):

For SC purposes, Level 1 offenses include the following state or federal crimes: national security violations, homicide, kidnapping, sexual assault, robbery, aggravated assault, threats of bodily harm, extortion or threat to injure a person, sex offenses, cruelty toward child or spouse, resisting an officer, weapons

violations, hit and run involving injury or death, and drug offenses involving a sentencing to a term of imprisonment greater than one year. Level 2 offenses are primarily property crimes and Level 3 offenses are other crimes, primarily misdemeanors.

Notably, Level 2 offenses also include all drug-related crimes that result in prison sentences of less than one year. If ICE and Secure Communities prioritize violent and dangerous criminals, a majority of their deportations should involve Level 1 offenders. However, ICE statistics show a practice that is much different from what they preach. To date only 29.3% of deportations under Secure Communities have been Level 1 offenders (“Secure Communities Monthly”). Meanwhile the least dangerous individuals, including all non-criminal immigration offenders and Level 3 criminal offenders (crimes which do not cause deportation for those with legal immigration status) make up 52% of deportations under Secure Communities (“Secure Communities Monthly”). Of the total, 22% of deported people had no criminal convictions whatsoever (“Secure Communities Monthly”).

Recently ICE has touted the use of prosecutorial discretion in whom it targets for removal. An internal memo especially cautioned against detaining or deporting witnesses of crimes (Morton, “Prosecutorial”). However, Secure Communities undermines the proclamation of discretion that would prioritize dangerous criminal aliens because it reviews every single individual booked into custody with automatic database alerts for even the tiniest blip in the records. Although ICE claims on its website that it considers a “number of different factors” in deciding whether to release or deport an alien, the statistics show a different story. The high numbers of non-violent and non-criminal

deportations indicate a blind willingness to deport as many people as possible, with little to no discretion in the process. Like 287(g), Secure Communities lacks clearly defined goals and guidelines, as well as the proper oversight and accountability to make sure that it operates as directed. It can also levy hidden costs on local enforcement agencies if knowledge of the program leads officers to make a higher number of arrests in hopes of catching a deportable immigrant.²⁰

President Obama is trying to put a more liberal spin on the Republican immigration enforcement mandate. In practice, however, the bed mandate remains enforced while the Obama Administration's directives to focus on violent, dangerous aliens are not. In a world of political score keeping, the Republican party is winning on immigration enforcement.

Part Four: (Lack of) Protections Against Arbitrary, Wrongful, and Indefinite Detentions

As a rule, ICE places people who are suspected of being deportable into immigration detention.²¹ Immigration detention is not used in place of traditional prison

²⁰ I could not find hard statistics on the overall arrest rate under Secure Communities although there is evidence of high numbers of non-criminal arrests which likely result in a higher arrest rate overall.

²¹ In addition to deportations, Customs and Border Patrol (not Immigration and Customs Enforcement) also expels people from the country in a process that is rarely discussed: voluntary departure, sometimes called "returns" by the DHS. Voluntary departures are agreements in which individuals agree to remove themselves from the country within a certain period of time, facing a fine up to \$5,000 and 10-year ban from the country if they fail to do so.²¹ This type of deformed removal governs more than 1 million cases every year.²¹ For many, it is a good deal because it does not forcibly bar them from reentering the country in the future and it allows them to return to their country of origin on their own terms. However, this means they must bear the cost and responsibility of exiting the country. In some cases this can be challenging, but most voluntary departures happen right at the border after coming into contact with a Customs and Border Protection official, and a majority of these occur at the Southwest Border, between the U.S. and Mexico. In these most common cases, an individual essentially turns around and walks back across the border. Voluntary removals are usually (not always) simply stopping someone from entering into the United States, not removing them from within the interior of the country.

or jailing facilities; it is its own system. It exists for the purposes of enforcing immigration law and detains both criminal and non-criminal deportable individuals. For criminal aliens, they undergo criminal trials and any punishments and are sent to immigration detention directly after serving any prison time. Even though they have paid their entire debt to society, they are not allowed freed after their punishment. As mentioned in earlier sections, detentions do not always align with enforcement priorities and are sometimes unlawful. This section describes the options available for immigrants to challenge their detentions and deportation orders.

4.1 Classifications: A Non-Punitive Administrative Measure and Seeking Entry

The U.S. government does not consider immigration detention or deportation to be punishment. Instead it views immigration detention as part of an administrative procedure (to prevent individuals from escaping deportation proceedings) that is not punitive in nature, despite the fact that some immigration facilities double as traditional prisons, house prisoners and immigrants in the same conditions, and/or are operated by corporations that specialize in private prisons. Since detainees are placed in *detention* and not technically in prison, they are not guaranteed the constitutional and due process protections that are required in criminal proceedings. After an immigrant has been detained, the non-citizen has far fewer recourses to remedy or appeal the situation than if they had been sentenced to prison. Because of the non-punishment classification of detention and the civil-not-criminal nature of deportation proceedings, hundreds of

thousands of individuals every year are denied due process and subject to inhumane detention within the United States.

While immigrants who are documented and undocumented, criminal and non-criminal, are placed in immigration detention, migrants who crossed the border without any inspection receive an especially harmful classification under U.S. law. These individuals have never “made a legitimate entry into the U.S.” and are therefore “treated extra-territorially as subjects standing at U.S. border points of entry” (Coleman). They are classified as *seeking entry* to the United States, are not considered a person within the United States (Golash-Boza, 6), and are thus entitled to the least amount of constitutional protections of any alien. Since the person was never screened by a U.S. border patrol agent, the law sees them as potentially inadmissible persons, even if they already permanently reside in the U.S. Those considered to be *seeking admission* to the U.S. (even if they live here) may be subject to mandatory detention and expedited removals.

4.2 Non-Formalized Removals: Expedited Removals, Administrative Removals, and Stipulated Orders of Removal

Expedited removals are deportation orders that can be carried out by immigration officers without any judicial review, as opposed to a removal of a non-citizen who is deemed eligible for deportation (i.e., has a legal presence in the country that has expired or been revoked) who has the right to a hearing before an immigration judge.²² When expedited removals were first instituted in 1997, the Department of Justice said that expedited removals would only be applied to “arriving aliens at ports of entry”

²² There are other due process denials committed against immigrants besides lack of the right judicial review, as will be discussed late in this section, and even those who have a right to an immigration hearing often never exercise it.

(Kanstroom, 104). The expedited removal territory has since expanded to all areas within 100 miles of the border. In order to avoid being subjected to expedited removal, a non-citizen must prove that they have been in the country for at least two years, have legal immigration status, or have a legitimate claim of asylum (Grable). This system itself is dangerous because it places the burden of proof on the victim, not on the authorities, and does not allow appeals. This completely flips the traditions of U.S. jurisprudence, effectively creating a system that operates on the concept of guilty (and jailed) until proven innocent.

The system that is in place, with its few safeguards, is not administered correctly. The bipartisan United States Commission of International Religious Freedom published a report detailing expedited removals of genuine asylum seekers in which it found repeated failures to ask necessary questions that are designed to legitimize claims of asylum and frequent factual and legal errors (U.S. Commission). Expert analysis of expedited removals revealed that within its first decade of use, expedited removals wrongly denied entry to some 20,000 genuine asylum seekers (Pistone). This is one of the most misguided and deplorable aspects of the broken immigration system that, but this portion hardly makes headlines. When people arrive in our country fleeing violence and persecution, our country's policy is to detain all of them until a decision can be rendered on whether or not to allow them entry. The government puts refugee seekers in mandatory detention, regularly for up to three months at a time (Kerwin); it is their first welcome to their new lives in the country that prides itself on an uncompromising adherence to freedom.

In other cases non-citizens who violate their immigration status through an aggravated felony conviction are subjected to administrative removal. In administrative removals, individuals are also not granted immigration hearings but they do have the right to appeal their deportation. But just like expedited removals, there is no judicial review or discretion to determine whether the deportation has been ordered justly and morally.

Within a detention center, many detainees are unaware of their rights. All immigrants have the right to an immigration hearing in front of a judge except for those who have previously been ordered deported. However, many of them are not informed of this right or end up signing it away as a result of coercion or confusion. There are volunteer groups like Rocky Mountain Immigrant Advocacy Network in Denver that go to detention centers to inform detainees about their rights, but these groups cannot reach everyone and are already hindered in their mission because they rely heavily on part-time volunteers. As a result of detainees' ignorance of their rights, in any given year thousands of them waive their procedural rights and sign stipulated orders of removal, as a sort of immigration plea-bargain (Kanstroom, 66). As a part of these agreements, detainees agree to be deported without having a hearing in front of an immigration judge. Alternatively, they can choose to remain in detention indefinitely while fighting their case. Between 2004 and 2007, stipulated orders of removal increased six-fold, from 5,000 to 30,000 (Backgrounder) and totaled over 160,000 removals as of mid-2011 (Koh). Even though signing such a waiver of rights is required to be "voluntary, knowing, and intelligent" (8 C.F.R. §1003.25[b]), there are problems with lack of proper

translation, intimidation, and deliberate misinformation by deportation officials who may sometimes present such waivers as routine paperwork (“Language Barriers”).

Throughout the entire deportation appeals process, no matter what type of removal or the person’s immigration status, the person is usually detained. The appeals process, and accompanying detention, can last for years. In some cases individuals are eligible for bond, although even fewer of them realize it. Of those who are granted bond, many of them are also unaware that they can request to have their bond amount lowered if they believe it has been set too high. In many cases though, such as when a person is considered (usually subjectively) a flight risk or is subject to mandatory detention by law, they are not allowed the privilege of bail. Bond is forbidden for about two-thirds of detainees (Secretary Chertoff).

4.3 Length of Detention

For those removed from within the country, time spent in detention often extends beyond just the standard deportation process. The average detention length for an immigrant in ICE detention is around 37 days (“Alien Detention”), although this number is skewed low because of the high numbers of expedited removals and stipulated orders of removal. Even though there is a 90-day maximum²³ detention period for normal deportation proceedings (unless deportation is imminent at 90 days), that limit is inapplicable if an individual appeals their removal or is an asylum seeker. It is not uncommon for a person to spend multiple years in detention. At any given time at least

²³ By not prioritizing enforcement, truly dangerous individuals may be released from detention if not deported within 90 days. Budget cuts also prompt detainee releases. ICE released about 2,000 immigrant detainees in early 2013 in advance of the sequester (“Obama Administration”).

2,100 detainees have been held in immigration detention for more than one year, with no clear end in sight (Kanstroom, 122). Most of these detentions are wrongful in the first place as has been previously discussed, and almost all last far too long. It is impossible to say how many of these people appeal their deportations for fear of being killed or tortured if they return to their country of origin, or because they potentially face irrevocable separation from their families and/or livelihoods in the U.S.

This crisis is so harmful not only due to poor detention conditions,²⁴ but also because the deportation appeals process is so long. As if facing exile from their country of residence wasn't enough, some immigrant detainees spend years in detention and thousands of dollars to appeal their removal order. The slow speed at which immigration cases are processed is largely due to judicial backlog, which also occurs for initial immigration hearings but is especially a problem for immigration appeals. Currently there are only 254 immigration judges to hear over 300,000 pending immigration cases (Volpe).

4.4 Lack of Due Process Protections

Throughout this drawn-out detention process, there are nine key ways that the normative due process rights of immigrants are denied, all of which are protected²⁵ in criminal law proceedings:

²⁴ The alleged human rights abuse that take place in these facilities include emotional and sexual abuse, unexplained deaths, denied access to healthcare, and "individuals being thrown against walls by guards."²⁴

²⁵ In criminal procedure, due process protections are protected for all people, regardless of immigration status. For example, The Fifth and Fourteenth Amendment due process and equal protection guarantees extend to all "persons." The rights attaching to criminal trials, including the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses, all apply to "the accused." And both the First Amendment's protections of political and religious freedoms and the Fourth Amendment's protection of privacy and liberty apply to "the people" (Cole).

- Arriving aliens, including asylum seekers and undocumented resident aliens classified as seeking entry, as well as aggravated felons, are automatically denied an immigration bond. This leaves many innocent people languishing in detention, including aggravated felons who have already served out the entire prison sentence for their crime.
- Since deportation and immigration detention are civil procedures, there is no right to a jury trial to decide on the life-shattering actions of deportation or indefinite detention.
- With such high numbers of administrative removals, expedited removals, and stipulated orders of removal, judicial review and discretion is often non-existent in the process. Furthermore, immigration judges are technically part of the Department of Justice and are therefore part of the executive branch, contrary to the free-from-influence nature of judges who are supposed to operate independently of the Executive and Legislative branches of the government.
- The Ex Post Facto provision of the Constitution does not apply, meaning that following the passage of new laws, people can be retroactively deported for past offenses that were not grounds for deportation when they were committed.
- There is no right to an appointed counsel in immigration court. Although the defendants have the right to counsel, they must pay the high costs themselves.
- The Exclusionary Rule of the Fourth Amendment does not apply, meaning that any and all evidence is admissible in immigration proceedings with no regard to the legality of how it was obtained (Golash-Boza, 24).

- The Eighth Amendment's prohibition against cruel and unusual punishments does not apply since neither detention nor deportation is considered "punishment" (Golash-Boza, 24).
- Immigrants detained without a warrant are not required to be informed of their rights until official deportation proceedings have been started against them (Mendoza). This policy leaves open a wide window, from first contact with law enforcement or ICE agents until the formal filing of a deportation order, for an individual to surrender incriminating information without knowledge of their right to remain silent, or knowing that such information can be used as evidence against them.
- Similarly, there is no protection against self-incrimination as protected by the Fifth Amendment since deportation procedures is a civil proceeding.

In 2003, the Supreme Court heard a challenge to the constitutionality of detention during removal proceedings in *Denmore v. Kim*. The court ruled 5-4 that "the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings" partly because deportation proceedings "are typically not lengthy" (Golash-Boza, 15-16). In his dissent, Justice Souter argued that non-citizens are persons before the law and should be afforded due process, reminding us that in our society "liberty is the norm" (Golash-Boza, 16). His dissent is essentially not applicable for those immigrants classified as seeking entry into our country; they are not considered to be persons before the law. The Supreme Court majority opinion in this case relies on the assertion that detentions typically do not last very long, although there

are many cases in which detention ends up as essentially indefinite while submitting individuals to inhumane conditions.

The majority of these due process denials listed above are deemed permissible because of the civil nature of deportation proceedings and the non-punitive characterization of detention and deportation. Because of how it has been categorized, even though deportation procedure denies normative due process protections, it operates within its legal bounds. The question then becomes whether or not detention and deportation have been properly classified, and it looks as though neither has. Deportations and their accompanying detentions should be adjudicated under criminal law procedure since criminal law governs cases in which the government is the plaintiff and an individual who has disobeyed a law is the defendant. The United States defends the informal removals, civil administrative actions, as necessary, “largely because pursuing criminal charges in all cases would place a heavy burden upon prosecutorial resources and detention facilities” (Garcia). This is not a legal, logical, or ethical argument. According to this line of reasoning, informal removals that operate outside of judicial review or opportunity for appeal are used because they save money. Additionally, detention is punishment; it deprives people of their freedoms almost exactly as prison does. Deportation is also punishment, seeing as it forcibly removes people from their homes, jobs, and families, and in some cases sends them to distant nations that they may not have known since birth and where they may not speak the language. The law should embrace what is common sense; governments have used the exact practice as punishment for centuries under a different name: banishment. There is a calamitous lack

of due process afforded to immigrants who enter detention, causing thousands of people to languish apart from their families in prison-like detention.

Recommendations

Enumerated and explained here are 11 policy recommendations that would force immigration enforcement to be more narrowly tailored and get rid of overly lengthy immigrant detentions and their related due process violations:

1. Change the classification of detention and deportation so that they are officially considered forms of punishment. This would necessitate that deportation proceedings move from civil into criminal law, extending due process rights of criminal procedure to people in deportation proceedings. Some pundits in the immigration discourse deny that immigrants, especially undocumented immigrants, are entitled to such rights. But as the ACLU explains, “The fundamental constitutional protections of due process and equal protection embodied in our Constitution and Bill of Rights apply to every “person” and are not limited to citizens” (“Immigrants’ Rights”). If detention and deportation were correctly classified in accordance with their real-world implications, immigrants in deportation proceedings would receive the proper due process protections that they deserve. Federal criminal procedure requires a jury trial only in cases in which the defendant faces a punishment of six months or more of incarceration. Therefore, there would not be an extra burden on the government to furnish juries in addition to judges for deportation proceedings since the punishment does not require it.

2. If Recommendation 1 is implemented, then the law should be amended so that immigration violations such as illegal reentry are only punishable with deportation, not imprisonment. This in itself will not cut down on the number of people or amount of time spent in detention, but it would drastically reduce the overall time that many immigration offenders spend in prison-like facilities. Our government does not need to imprison someone for several years because they returned to the United States after having been previously removed; it serves no compelling national security or public safety interest. Other non-immigration crimes, especially violent ones, should remain punishable with prison as stipulated by statute. One objection to this policy might be that without an increased penalty for second offenses, there is nothing that will discourage repeat immigration offenders. That strategy, however, does not necessarily line up with immigration enforcement priorities, as it automatically punishes many people who had legitimate reasons for returning to the U.S., such as reuniting with family. Dangerous and violent criminals who commit crimes will face a criminal trial in front of a judge and with a right to a jury, which provides an opportunity for discretion in levying the harshest possible penalties when they are necessary.
3. Diminish the maximum bed capacity for immigration detention to the lowest possible number necessary for national security as determined by the Congressional Research Service, and accordingly repeal the “bed mandate” and reduce ICE funding to levels commensurate with the new detention capacity. Ideally this number is 10,000 beds or less. By cutting the numbers of detainees, ICE would have to strictly prioritize whom it detains, leading to fewer

unnecessary, wrongful detentions. Perhaps more importantly for the future, under this change privately contracted beds should be the first ones cut, meaning that as long as the new number remains less than 17,000 (which it reasonably would), private prison corporations would lose their vested interest in policy making relevant to immigration detention. This change would have an ancillary positive impact on human rights abuses inside the centers, since half of the ten most abusive detention centers are privately owned and/or operated, and the other half are contracted through local municipalities (Ray). To more assuredly exclude prison corporation influence, the lower detention capacity could include a mandate that all detention facilities must be government owned (although this provision would be very difficult to pass politically).

4. In conjunction with the lower detainee capacity, implement detention alternatives such electronic monitoring, probation, in-person reporting, or even consistent but random phone check-ins (similar to the random “color-line” scheduling of many drug court urine tests). Alternative methods are sufficient for non-dangerous detainees; they can assure that individuals show up for their hearings, but do so in a much more humane manner. Furthermore, alternatives can cost between 17 cents and \$17 dollars per person per day, and even if the most expensive methods were used in place of detention on all non-violent offenders, the DHS could save \$1.44 billion annually (The Math).
5. Do away with the “seeking entry” classification of people who have never made a formalized border crossing into the United States. Instead, reclassify the same group of people as “seeking legal entry,” thus acknowledging their presence in the

country and status as a person before U.S. law. This would afford them most of the same fundamental civil rights protections as immigrants with legal status, but still acknowledge that they do not yet have the legal right to be present inside the country.

6. Ban expedited removals, administrative removals, and stipulated orders of removal. These forms of informal removal have been argued as necessary to the efficiency of immigration control since they take very little time to complete in comparison to normal deportation proceedings. According to Mark Fleming, litigation coordinator for the National Immigrant Justice Center, “You have a massive backlog, and the most efficient way for [ICE] to meet its goal is to remove these folks through [informal deportations]” (Zamudio). However, with more judges (see #7, below) cases can move more quickly through the system and still be heard by an immigration judge. Doing away with these types of informal removals means that people cannot be confused or coerced into signing away their due process rights and unknowingly agreeing to deportation. Each case might take longer, but hiring more judges can mitigate any judicial backup by processing more cases at any one time.
7. Increase the number of immigration judges and the number of Bureau of Immigration Appeals (BIA) judges. Immigration judges handle regular hearings in immigration court whereas the BIA makes binding decisions on immigration court appeals. The increased personnel in this case would restore judicial review and discretion by allowing all persons under deportation proceedings to have a hearing in front of a judge. It would also decrease detention times by shortening

the time it takes to process immigration court appeals. There would be an inherent cost in hiring more judges, although that cost is potentially offset by lowering the amount of time that the Department of Homeland Security must pay to detain immigrants. It is hard to refute the hiring of more judges as cost-prohibitive, as their presence (for the purposes of protecting civil rights and national interest) would be a negligible portion of the United States federal budget.

8. Give immigration judges the authority to use their discretion to override mandatory removals, such as those resulting from certain criminal convictions and other violations of the Immigration and Nationality Act. This would aid in keeping families together and would stop the blind deportations of many people who have a real and honest claim to life in the U.S.
9. Increase the number of temporary work visas in order to increase the flow of low-skill, temporary workers back and forth across the border, especially the border with Mexico. As it stands now, the relatively low number of temporary visas available for low-skilled workers combined with intense border security incentivizes workers to remain in the U.S. illegally. The odds of receiving a work visa (or a visa renewal) are so low and the risks of an unsanctioned border crossing are so high, that many people choose to remain in the U.S. and bring their families here instead of returning home after their work period. Currently the U.S. grants about 110,000 H2 visas every year for the temporary admittance of low skilled workers (“Multi-Year”). The proposed immigration overhaul in the Senate would create a new class of visas for low skilled temporary workers called W-visas. The United States Chamber of Commerce initially requested that

400,000 W-visas be granted annually (Nakamura). As it was passed by the Senate, the proposal only offers 20,000 W-visas in the first year, increasing annually to 75,000 in the fourth year and creates the Bureau of Immigration and Market Research to set visa numbers in the future (Border Security).

10. Create a new ICE division specifically in charge of monitoring immigration enforcement and detention to give the agency closer and more accurate oversight. The division should have two primary functions: to keep thorough, accurate, and accessible statistics on the detainee population, and to monitor and enforce humane living conditions and treatment inside detention facilities. Their monitoring there should provide better information about where and when wrongful detentions and human rights violations occur. I recommend that the division adhere to the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, of which there have already been many documented violations within detention centers. The new division should present an annual report to the directors of ICE, Customs and Border Patrol, and the Department of Homeland Security, as well as make it publicly accessible. The information provided by the division can be used as the basis for corrective administrative actions such as dismissing personnel and levying fines against contracted facilities or municipalities for failing to uphold proper standards of treatment. Under this scrutiny and with a judicial system that allows for discretion, the Criminal Alien Program and Secure Communities should continue to function (287[g] seems superfluous) since in some cases they play an integral role in deporting truly dangerous criminals.

11. Allow full access and transparency for journalists inside detention centers. This includes allowing the operation of recording equipment inside the facilities and private access to detainees, away from the sight and hearing of guards or other facility personnel. Perhaps the most fundamental step in solving a problem is exposing it to the public.

One piece of ancillary advice should be included with these recommendations, even though it does not directly address immigration detention: do not increase border security measures. Most scholars have widely discredited border security as ineffective for stopping the flow of immigration, including Suffolk University Scholar-in-Residence James Carroll who writes that the Southern border “should not be sealed...Razor wire and drones are not remotely part of the answer” (Carroll). If there is opportunity in our country, people will find their way to it. Unfortunately, the political process has incorporated additional border security in the Senate’s proposed immigration overhaul, including \$7.5 billion over the first five years that is required to be spent only on fencing (Carroll).

In addition to policy recommendations, cultural shifts are fundamental to inspiring political change. Nothing happens in politics if it is not instigated by an outside force, whether that force is campaign contributions, a pressing public need, or constituent pressure. Changing attitudes and minds on a large scale is much more nuanced and less concrete than proposing new laws and policies. It starts at a young age and happens through education and conversation with family, friends, and people with opposite viewpoints. Media plays a huge role in everyday life and has a capacity to reach people

like no other means available today. But if public attitude does not demand it, the immigration detention system will not change.

Conclusion

This project sought to understand why our country has detained and deported record numbers of immigrants in recent years. It found that privately owned prison corporations are primary beneficiaries of an enlarged detainee population and have expended large amounts of money and effort to pass laws that keep immigrants in detention. The Executive Branch of the United States Government justifies its actions by claiming that it focuses enforcement efforts on violent and dangerous “criminal aliens.” In most cases, the violent “criminal aliens” targeted by immigration enforcement are in fact not dangerous or violent, and often not criminal at all. The programs that partner local law enforcement with the Department of Homeland Security to aid in identifying and deporting dangerous criminals suffer from rampant racial profiling and abuses of authority. Their administration leads to the detention and deportation of many thousands of non-dangerous, non-violent individuals every year. Furthermore, once immigrants are in detention, many of them are denied their due process rights to fight their captivity and deportation orders. This civil rights denial is partly the result of a classification system that views persons within our national borders as *seeking entry* to the country and therefore not present under the law of the United States. Denials of normative due process are also due to the definitions of detention and deportation as administrative actions instead of punitive in nature which aid in keeping detention and deportation proceedings within the realm of civil law, apart from the protections that govern criminal

procedure. Some immigrants are also denied their due process because of coercion by law enforcement officers, confusion from inadequate translation services, or simply by not being informed of their rights.

The work on this project has been limited by a lack of sufficient statistics, inconsistencies in data from different sources,²⁶ and a general shroud of secrecy surrounding immigration detention. The first step for further fruitful research on this topic, and eventually for proper and lasting solutions, is to bring greater transparency and reliable record keeping to the immigration detention system. One compelling option for future study is to further investigate the history, rationale, and legality of why deportation hearings are conducted as civil, rather than criminal, proceedings.

This paper implicates a number of institutions, both public and private, in the criminalization of immigrants in the United States. Every year immigration detention unnecessarily harms hundreds of thousands of detainees, and millions of their family members and friends. The United States spends almost \$2 billion a year on immigration detention even though cheaper, equally effective, and more humane alternatives exist. The current immigration detention system is a source of civil rights abuses and profiteering that operate under the guise of national security and compelling state interest. The historically high numbers of detentions and deportations are unnecessary and unjust, misleading to the public, and harmful to the human condition.

²⁶ Some sources were strongly biased or purposefully misrepresented information in order to reinforce their message. When I encountered conflicts in data I used the most reputable source or, if there was not one clearly reliable source, I used the statistic that was most commonly found in other sources. After gaining an in depth understanding of this topic, it was easier to identify incorrect and misleading information.

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